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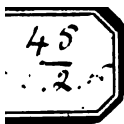
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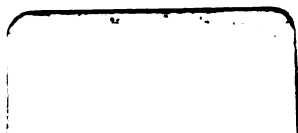


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THE PRINCIPLES CX<sup>0</sup>

OF

INTERNATIONAL LAW

BY

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To  
MY AMERICAN PUPILS



## PREFACE.

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INTERNATIONAL Law may be regarded as a living organism, which grows with the growth of experience and is shaped in the last resort by the ideas and aspirations current among civilized mankind. He who would accurately describe its present condition must sketch the outlines of its past history and gauge the strength of the forces which are even now acting upon it. He must understand the processes whereby it reached the shape in which we see it and forecast the changes which will accompany its future growth. The perfect publicist must take all philosophy, all history and all diplomacy to be his province. He must weigh in the balance of absolute impartiality the actions of statesmen and the decisions of judges. He must be familiar in equal degree with the rough amenities of camps and the stately etiquette of courts. I lay no claim to the possession of these exalted qualifications. I have but attempted to trace the development of International Law in such a way as to show on the one hand its relation to a few great ethical principles and on the other its dependence upon the hard facts of history. The severest critic cannot be more sensible than I am of the deficiencies of my work. They are due partly to the greatness of the task compared with the powers of the doer, and partly to untoward circumstances of change and unrest which hampered its progress from beginning to end. I shall be more

than satisfied if I have succeeded in placing before students of political science a clear and readable outline of one of the most important branches of their subject.

The book is divided into four parts. The first deals with the nature and history of International Law, and in the order of thought precedes the others, which set forth the rules observed among states during peace, war and neutrality. But nevertheless it will be wise to leave a careful study of the questions discussed in the first three chapters till the rest of the work has been mastered. Some knowledge of the usages of international society is necessary before the student is in a position to appreciate the tendencies of opposing schools of thought among publicists. Nor need any inconvenience arise from this mode of procedure; for nothing is easier than to turn back at the end of a book and read again with an educated eye the early pages, whose discussions on definition and method puzzled the mind not yet familiar with the subject of which they treat. I have striven throughout to avoid unnecessary controversy. When I have been obliged to wrestle with philosophical problems or historical puzzles, I have endeavored to avoid the reproach of mistaking obscurity for profundity. But on the other hand I have recognized that difficulties are not overcome when they are shirked, and my aim has always been to bring to bear upon them the best resources at my disposal. If I have failed, the fault is due, not to inability to see the mark, but to lack of power to hit it.

In a work written in English, and intended in the main for British and American readers, it is natural that most of the cases should be taken from British and American history. I have so taken mine of set purpose. The more the two great English-speaking peoples know of each other the better friends they will be; and on their friendly co-operation de-

pend the fairest hopes for the future of humanity. No one who has taught, as I have taught, on both sides of the Atlantic, can have failed to notice that the influence of old controversies and misunderstandings has not entirely passed away, even among the educated classes. I have approached these questions with a sincere desire to show to each side the strength of the other's case and deal out impartial justice on every occasion. If I have ever inclined the balance too much in favor of my own country, the error is that of one who, were he not an Englishman, would ask no better fate than to be an American.

The story I have to tell will be found in the text. I have not relegated important matter to notes, nor printed on my pages long quotations from other authors or excerpts from original authorities. I have preferred the much more laborious task of extracting their substance and putting it in my own words into the body of the book, which I trust has gained thereby in both decrease of bulk and increase of readableness. But I have taken care to provide the means of checking my assertions. At the bottom of nearly every page will be found references, by the use of which teachers and students can amplify or correct the statements in the text and men of affairs obtain the more detailed information they may want for practical purposes. The notes are, I hope, sufficient. My object has been to make them adequate without overloading them with matter. I have not, for instance, referred to a large number of writers of all degrees of authority, when the citation of a few great ones gave the necessary support to my argument; nor have I quoted a dozen cases, when one or two were enough. I have also taken care that most of the cases given in the text should be something more than mere names to my readers. The material facts are almost always described, so that the points of law may be seen in

relation to the actual circumstances which were before the courts. The table of contents has been so arranged as to afford an analysis of the whole book.

The writer of every new work on International Law is the debtor of all who have gone before him in his particular sphere. His best acknowledgments are to be found in his references and quotations. The extent of my own obligations to others may be roughly measured by the frequency with which their names occur in my notes; but I cannot refrain from making special mention of two. I have been helped at every turn by the robust judgment and incisive arguments of Mr. R. H. Dana, and the judicial reasoning and encyclopedic knowledge of Mr. W. E. Hall. Both have joined the majority, not indeed too soon for fame, but too soon for the expectations of those who profited by their labors. Mr. Hall was taken from us in the zenith of his powers, and Mr. Dana had collected the materials for what I venture to think would have been the best of all books on International Law, had he lived to write it. To the memory of both I offer my humble tribute of reverence and admiration.

T. J. LAWRENCE.

July 24, 1895.

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#### PREFACE TO THE SECOND EDITION.

A sudden and pressing call for a Second Edition has left me little time for alterations. I have, however, endeavored to benefit by the friendly criticism the book has received. A few mistakes in names and dates have been corrected. One or two statements that seemed to require modification have received it; and an effort has been made by the addition of foot-notes here and there to bring up to date the information contained in the text.

T. J. LAWRENCE.

GIRTON RECTORY, CAMBRIDGE, ENGLAND,  
November 2, 1897.



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PART I.

THE NATURE AND HISTORY OF INTERNATIONAL LAW.

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CHAPTER I.

THE DEFINITION OF INTERNATIONAL LAW.

§ 1.

INTERNATIONAL Law may be defined as *The rules which determine the conduct of the general body of civilized states in their dealings with one another.*

The definition of International Law. Difficulty of making it quite satisfactory.

In International Law, as in other sciences, a good definition is one of the last results to be arrived at. Until the nature and scope of any study are clearly seen, its boundaries cannot be determined with perfect accuracy. A definition, in order to be satisfactory, ought to give with precision the marks whereby the thing to be defined is distinguished from all other things; and unless it does this it is either incomplete or misleading. We may expect that different definitions of a science will be given, not only in its infancy, before its nature and limits are clearly understood, but even in its maturity, if those who cultivate it differ as to its methods and as to the extent of the subject-matter with which it deals. International Law is in this latter predicament. It has been studied for ages; but though its expounders are grad-

ually approaching towards the adoption of a consistent body of doctrine, they have not yet come to an agreement upon such questions as the exact character of the processes to be followed in their reasoning, or the relation of their science to Ethics and Jurisprudence. Accordingly each writer's definition is colored, to a certain extent, by his own views; and the definition at the head of this chapter is no exception to the general rule. It regards International Law, not as an instrument for the discovery and interpretation of a transcendental rule of right binding upon states as moral beings whether they observe it or not in practice, but as a science whose chief business it is to find out by observation the rules actually followed by states in their mutual intercourse, and to classify and arrange these rules by referring them to certain fundamental principles on which they are based.

## § 2.

It will be seen that in the definition we have given, no mention is made of rights and obligations of states. These

The precepts of International Law are rules whether they are or are not laws.

terms have been carefully excluded in order to avoid the controverted question whether International Law is, strictly speaking, law or not.

If it be law proper, then it confers rights and creates obligations; but if the term *law* is improperly applied to it, we cannot with propriety speak of rights and obligations as flowing from it. In framing a definition, it is advisable to include as little controverted matter as is possible without sacrificing clearness to a desire of avoiding difficulties. Acting upon this principle, we have used the neutral term *rules* instead of the disputed word *laws*, and have discarded altogether the phrase *rights and obligations*. The question whether our science is properly described as law will be found discussed further on;<sup>1</sup> but whichever side in the controversy we take, we may adopt the definition at the head of this chapter.

<sup>1</sup> See §§ 8-11.



## § 3.

The governments of all states, whether civilized or barbarous, are compelled to exert activity, not merely in conducting their internal affairs, but also in regulating their conduct towards the governments and peoples of other states. Even where a state adopts a self-sufficient theory of national life, and endeavors, as China did till quite recent times, to keep its people from all intercourse with foreigners, it does not escape from the necessity of dealing with them. It cannot act as if it were alone in the world, for the simple reason that it is not alone. The whole machinery of non-intercourse is created with a view to other states, and absorbs in its working no small portion of the care and attention of the government. If, then, external affairs have from the necessity of the case to be dealt with by states who have adopted a policy of the most rigorous isolation, it is clear that the vast majority of peoples, who desire a greater or less amount of intercourse with their neighbors, impose thereby upon their rulers the task of dealing to a very large extent with foreign nations. The coexistence of states in proximity to one another renders it necessary for them to pay some sort of regard to each other; and the more civilized the states, the more intimate the intercourse. Civilization not only provides men with many interests in common; but it also tends to remove man's suspicion of his brother man. Commerce, intermarriage, scientific discovery, community of religion, harmony in political ideas, mutual admiration as regards achievements in art and literature, identity of interests or even of passions and prejudices, —all these, and countless other causes, tend to knit states together in a social bond somewhat analogous to the bond between the individual man and his fellows. But just as men could not live together in a society without laws and customs to regulate their actions, so states could not have mutual intercourse without rules to regulate their conduct.

International Law is generally observed by states, though here and there some of its commands are disregarded.

The body of such rules is called International Law. We do not say that it is invariably observed. Like other law, it is sometimes disregarded by those who are supposed to submit to it; and owing to the absence of coercive force to compel nations to obedience, it is more liable to be violated than are the laws laid down by the sovereign power in a state for the guidance of its subjects. But, all statements to the contrary notwithstanding, it is generally observed. A state here and there may sometimes disregard one of its plainest precepts; but it does "determine the conduct of the *general body* of civilized states," and this is all we assert in our definition.

#### § 4.

Strictly speaking, there is not one International Law, but several. Wherever a group of peoples are compelled by local contiguity or other circumstances to enter into relations with each other, a set of rules and customs is sure to grow up among them, and their intercourse will be regulated thereby. The rules will differ at different times and among different groups. Their nature will be determined by the ideas current upon the subject of international intercourse and the practices permissible in warfare. In these matters the notions of classical antiquity differ immensely from those of modern Europe, and in our own day there is a great gulf fixed between the views of European and American statesmen on the one hand and those of the potentates of Central Africa on the other. But though there are several systems of International Law, there is but one important system, and to it the name has been by common consent appropriated. It grew up in Christian Europe, though some of its roots may be traced back to ancient Greece and ancient Rome. It has been adopted in modern times by all the civilized states of the earth. The nations of the American continent are bound by it no less than the powers of Europe. We have, therefore,

International Law  
applies to civilized  
states only, though  
it is not confined  
to Christian states.

in our definition, spoken of it as "the rules which determine the conduct of the general body of *civilized* states." But we have not thought fit to follow the example of some writers, and limit it still further to *Christian* states.<sup>1</sup> It is quite true that modern International Law grew up among nations which professed Christianity, and that many of its chapters would have to be very differently written if Christian influences had been absent from their formation. But it is also true that more than one non-Christian state has adopted the European international code. Turkey, for instance, and China make formal profession of regulating their conduct by it, and expect other states to observe it in dealing with them. In the face of such instances as these, it would be playing with facts to restrict International Law to Christian states.

### § 5.

We have spoken hitherto of the mutual intercourse of states and the rules for dealing with it. But a great part of International Law consists of rules for carrying on war, and war cannot with propriety be termed international intercourse. Yet if it is not intercourse it arises out of intercourse; for if states could live an isolated life, though they would never be friendly, they would also never quarrel. Moreover, civilized states have in the course of ages come to adopt, and in a large measure to keep, a number of most important rules for determining their conduct when at war, both towards the enemy and towards other powers not involved in the quarrel; and the latter, who are termed neutral, have also to observe special rules with regard to the belligerents. All these rules are parts of International Law; for they guide the conduct of states in their relations with one another. We have endeavored to include them in our definition, along with the rules of ordinary pacific intercourse, under the com-

International Law regulates the conduct of states in their mutual dealings, hostile, as well as pacific.

<sup>1</sup> e.g. Woolsey, *International Law*, § 5.

prehensive phrase, "rules which determine the conduct of the general body of civilized states in their *dealings* with one another."

### § 6.

Matters belonging to the sphere of external activity are generally carried on between state and state, or, to speak with absolute precision, between government and government. But there are certain exceptional cases where external matters have to be settled between the government of one state, acting through its authorized agents, and private individuals belonging to another state.

International Law includes the rules of maritime capture, but not the rules for determining which of two conflicting systems of law shall prevail in matters of private right.

Thus, if in time of war a subject of a neutral state attempts to carry to one of the belligerents articles useful chiefly for warlike purposes, such as arms and ammunition, the other belligerent may stop him on the high seas or in belligerent territory, and confiscate all the goods in question. In such cases the belligerent state deals directly with the neutral individual. It has not to complain to his government and get him restrained or punished by the laws of his own country; but it is allowed by International Law to strike straight at the offender and confiscate his property. We see, therefore, that our subject includes some of the dealings of states in matters of public right and public policy with subject individuals belonging to other states; and it may seem at first sight as if such cases were not provided for in the definition we have adopted. But this is a mistaken view. The neutral individual whose contraband cargo is confiscated suffers under a rule to which his government has given express or tacit consent, and if any other rule is applied it will at once protest and demand compensation for the injury done to its subject. It is only the *procedure* which applies in the first instance to a private person. The *rules* are international in the strictest sense, and moreover they deal with public affairs. To continue the illustration with which we began, the ques-

tion whether or no a belligerent state should have the right to stop trade between its enemy and neutrals in articles directly useful for war, is a most important question of public policy, and is settled by the code which the great society of independent and civilized states has adopted for the regulation of the conduct of its members towards each other. The fact that it is found convenient to allow the belligerent to deal first with the offending individual and his property, does not deprive the matter of its international quality. It belongs to the sphere of the mutual dealings of civilized states. But the same statement can hardly be made concerning those questions of private right which arise owing to differences in the rules laid down by states for the regulation of such matters as contracts, wills, and intestate succession. When a man dies intestate in one state leaving property in another, or makes a contract in one state to be performed in another, tribunals have to decide whether the law of the former state or the law of the latter shall prevail in the common case of a difference between them. There are many other questions of the like kind in which a conflict between two or more systems of law has to be settled, and in the course of time a large number of rules have grown up for their settlement. These rules are adopted and administered by the courts of most civilized states, and are sometimes called Private International Law. But the title is a misnomer. The rules in question cannot with propriety be called international.<sup>1</sup> They deal with internal and private matters. A state can forbid its tribunals to enforce any of them without committing an offence against the law of nations. The branch of jurisprudence which deals with them was properly termed by Judge Story, one of the greatest of its expounders, *The Conflict of Laws*; and we shall not attempt to consider it under any of the chapters of the international code. It is, however, necessary to add that when we come to formulate a state's Rights of Jurisdiction,

<sup>1</sup> Holland, *Jurisprudence*, 286-288.

we shall have to define the limits of its authority over cases such as we have just described. But it is possible to do this without entering upon a discussion of the minute and highly technical rules which are administered by courts in deciding matters of private right where the law of one country conflicts with the law of another.

### § 7.

The name *International Law* is much more modern than the system to which it is applied. Facts and theories as to the origin and basis of our science have been reflected in its nomenclature. A great number of its precepts and many of its diplomatic forms were derived from Roman Law, directly by civilians or indirectly by canonists, and accordingly it was sometimes entitled *Civil Law* (*Jus Civile*). Bishop Ridley, as Visitor of the University of Cambridge in the reign of Edward VI., declared in a speech to that learned body, "We are sure you are not ignorant how necessary a study that study of Civil Law is to all treaties with foreign princes and strangers."<sup>1</sup> And about a century and a half afterwards Locke, in his work on Education, wrote this quaint and significant passage, "A virtuous and well-behaved young man, who is well versed in the general part of the Civil Law (which concerns not the chicanery of private cases, but the affairs and intercourse of civilized nations in general, grounded upon principles of reason), understands Latin well, and can write a good hand, one may turn loose into the world with great assurance that he will find employment and esteem everywhere." Meanwhile other influences had made themselves felt. The Puritan idea that the Bible contained a complete code of conduct applicable to all possible conditions caused such works to be written as Richard Bernard's *The Bible battels, or the sacred art military; for*

The history of the names given to the science.

<sup>1</sup> Nys, *L'Histoire Littéraire et Dogmatique du Droit International en Angleterre*, 27.

*the rightly wageing of warre according to the Holy Writ.* This was published in 1629, four years after the epoch-making work of Hugo Grotius, *De Jure Belli ac Pacis*, had appeared at Paris. Pufendorf, the great disciple of Grotius, published in 1672 his *De Jure Naturæ et Gentium*, the title of which bore witness to the influence exercised on our subject by the theory of a Law and a State of Nature. Similar evidence is afforded by the names bestowed upon their works by many of the great publicists of the last century. But after the publication by Vattel in 1758 of his *Droit des Gens*, the phrase *Law of Nations* was generally used to indicate the international code. Its capital defect as a name was the fact that it exactly translated the Latin *Jus Gentium*, and thus lent color to the erroneous fancy that a large and important department of the law of ancient Rome was concerned with the mutual rights and duties of independent states. The great English jurist, Jeremy Bentham, put an end to the difficulty by coining, in 1780, the phrase *International Law*.<sup>1</sup> It was a translation of part of the title of a work by Dr. Zouch, who was Judge of the English Court of Admiralty in the reign of Charles I. and author of a book entitled *De Jure Feciali, sive Judicio inter Gentes*. The phrase *Judicium inter Gentes*, happily anglicized into *International Law*, set forth with admirable brevity and clearness the distinguishing characteristic of our science. It deals with the relations of states to one another. Its rules refer to the affairs which arise between them. No better name than *International Law* could be found for it. Nearly all modern writers have adopted the phrase; and there is little chance of its being superseded by any other title.

<sup>1</sup> *Principles of Morals and Legislation*, XIX., § xxv.

## CHAPTER II.

### THE NATURE OF INTERNATIONAL LAW.

#### § 8.

IN discussing the nature of our science, we find ourselves confronted by two great questions. We have first to consider whether International Law is, properly speaking, law at all. And in the second place, we must settle for ourselves the problem of the origin and essential character of the rules we study. Can they be deduced from principles of universal authority, which every man of sense discovers for himself by the exercise of his reason, but which exist independently of human arrangements and human rules? Or must they be generalized from the practice of states in their dealings with one another? In other words, are the methods of International Law transcendental and *a priori*, or are they historical, inductive, and classificatory? We will deal with these two questions in the order in which we have stated them.

The two problems:  
(1) Is International Law really Law? (2) Are its principles and rules derived from intuition or experience?

#### § 9.

The controversy with regard to the first question dates from the publication of Austin's great work on Jurisprudence in 1832. He defined Law in its widest sense as "A rule laid down for the guidance of an intelligent being by an intelligent being having power over him."<sup>1</sup> This definition, read in the light of the

The Austinian definition of Law excludes International Law.

<sup>1</sup> Austin, *Lectures on Jurisprudence*, I.



explanations of its author, requires that any precept concerning conduct shall, before it can properly be termed a law, (a) command not an isolated act or forbearance, but a course of conduct; (b) proceed from an individual or body of individuals who have the intelligence to conceive and the power to express a wish with regard to the conduct of other intelligent beings; (c) be enforced by the fear of evil to flow from its authors and fall upon those to whom it is set in case they disobey it. If an individual possessing on the one hand intelligence, and on the other hand power to inflict punishment, issues a general command to any one over whom he can exercise his power, that command is a law and the person who issues it is a legislator. But laws are more often made by a number of men acting in concert than by one man acting alone. If such a body possesses corporate intelligence and corporate volition, — if, that is to say, it is a determinate body, all of whose members can be known, a body capable of thinking, willing, and acting as a whole, — then it can set a law, provided that it is able to make those who disobey it suffer some predetermined penalty. This penalty is called a sanction; and the three essential elements in any law are the *Command* issued to those who are expected to obey it, the *Obligation* resting on them to obey it, and the evil, or *Sanction*, to fall upon them in case they do not obey it.

The Austinian argument goes on to state that rulers of political communities, whether individuals or bodies, are the great earthly legislators. They wield the stored-up force of the community, and can make their commands obeyed with far greater facility and over far larger areas than ordinary individuals. The law they set is called *Positive Law*, in order to distinguish it on the one hand from *Divine Law*, and on the other from those precepts which men obey, though they are not set directly or indirectly by political superiors, and which are called *Positive Morality*. Of the precepts of Positive Morality, some are law proper, and some are not. Those that have a determinate author and are

armed with a definite sanction, are really laws. Those that are set merely by general opinion are not laws. Their authors are an indeterminate body; and though it is possible that those who disobey them will be made in some way to suffer in consequence of their disobedience, yet there is no clearly defined penalty denounced beforehand against the disobedient. This class of precepts comprises most of the customary rules observed among mankind. The laws of fashion, the rules of politeness, the generally observed conventions as to propriety of conduct, are obviously included within it. International Law does not at first sight seem to bear much resemblance to these. Yet, according to Austin, it is properly classed along with them; for it is set to governments and nations, not by any common superior armed with power to enforce obedience, but by the public opinion of civilized states; and in case of disobedience, no definite punishment is authoritatively denounced against the offender, though in all probability some other state or states will bring some evil to bear upon it in consequence of the offence.

### § 10.

It never seems to have occurred to Austin that any definition of law other than his own could be constructed with the slightest approach to scientific accuracy. But in truth, his results are obtained by seizing upon one element only in a complex conception. upon one element only in the ordinary conception of law, and elaborating it to the exclusion of all the rest. It is quite possible to take other elements in the same complex conception, and elaborate them with precision equal to that of the great analytical jurist. He gives prominence to the idea of force. A law is a precept which you can be compelled to obey. He who can bring evil upon you can set you a law. You are under a law when you are impelled by fear of evil to observe another's command. But it is clear that the idea of orderly and methodical procedure towards a

Austin lays stress upon one element only in a complex conception.

given end is also part of the usual notion of law. When human conduct is controlled by no principles, when we discover no consistent rule of action, when restraining power is absent and all is irregular and chaotic, we at once describe such a life as lawless. Now we can surely make this notion of order and restraint the pivot of our definition of law, with just as much accuracy as Austin makes his definition turn upon the notion of superior force. For in truth, the idea of law contains so many elements, that no definition could include them all; and it is absolutely necessary to take a portion only of the conception and treat it for the purposes of definition as if it were the whole. A similar method has sometimes to be followed in other sciences. The economist, for instance, constructs a theory of exchanges based upon the tacit assumption that men are actuated by the desire of gain. But he knows that in practice other motives are at work. Habit, love of ease, the desire to do a neighbor a good turn, the wish to benefit persons of a particular way of thinking, a feeling in favor of social justice, and countless other considerations, act upon people even in their commercial transactions. But it would be absolutely impossible to calculate beforehand the force of all these motives. The student of the mechanism of exchange, therefore, seizes upon that which is the most prominent, and powerful, and universal of all that operate in matters of trade. He calculates as if it were the only one; and then proclaims that in practice allowance must be made for others, because their effect is to modify, in a greater or less degree, the results that would have occurred had the main motive been the only one.<sup>1</sup> In the same way the jurist should understand that in constructing a definition of Law he must be content to take a few of the most prominent features in a very complex notion, and should admit that the classifications based upon his definition cannot represent with absolute accuracy the ordinary ideas of mankind.

<sup>1</sup> Cf. Maine, *Early Institutions*, Lecture XII.

## § 11.

But there is a peculiarity about the notion of Law which renders it almost impossible to define the thing so as to command universal assent. No one element in the notion is so prominent that all the others are small in comparison with it. At one time we seem instinctively to consider a law as the command of a superior, at another as the regulator of conduct, at a third as that which compels the unwilling to comply in outward act at least with the rudimentary precepts of righteousness, at a fourth simply as the producer of uniformity, and at a fifth as a command proceeding from properly constituted authority. Now it is difficult to say which of these ideas should be worked into a definition of Law to the exclusion of the others; and yet it is clearly impossible to include them all if we would avoid inextricable confusion. The first two are certainly the most important, and writers on Jurisprudence generally take one or the other of them as the starting-point of their speculations. Austin has worked out in detail the conception of Law as the command of a superior, and has based upon it an important and accurate classification of the different kinds of rules observed among men. Others, of whom perhaps Richard Hooker, the great Elizabethan divine, may be taken as the best representative, have adopted as their fundamental idea with regard to law the notion that it is that which regulates conduct. Hooker, in the first book of his *Ecclesiastical Polity*, when speaking of those who had anticipated by more than two centuries the fundamental doctrine of Austin, says: "They . . . apply the name of Law to that only rule of working which superior authority imposeth; whereas we, somewhat more enlarging the sense thereof, *term any rule or canon, whereby actions are framed, a law.*" Hooker does not work out his fundamental conception with the scientific precision of Austin; but with a few alterations and improvements his

It is possible to make a definition of Law turn upon the idea of order instead of the idea of force, and if this is done International Law is Law in the strictest sense.

classification of the various kinds of rules might be made as accurate as that of the later jurist. Each would be impregnable to criticism, if once its fundamental principle were granted. Both principles are involved in the complex conception of law. Both definitions of law are the results of abstraction. That is to say, they are obtained by withdrawing attention from all other portions of the notion and concentrating it upon the one portion which is deemed most important. The only question for argument is, Which of the two ideas is the key to the greatest number of distinctions between various kinds of rules, which can be made the basis of the classification most convenient for the purposes of daily life and most fruitful of results in the field of juristical research? Any attempt to answer this question would be foreign to our present purpose. It will be sufficient to point out here that Hooker's definition of Law as "any rule or canon whereby actions are framed"<sup>1</sup> clearly included International Law, since that law is a collection of rules for the guidance of human conduct in one of its most important spheres of activity. Austin, as we have seen, denies the term Law to the rules which govern the mutual intercourse of states. International Law is, therefore, properly called Law if we take one definition, improperly so called if we take another definition. But since the common consent of writers upon the subject gives it the disputed title, we need not hesitate to adopt the name without making an attempt to solve the difficult question of its perfect accuracy. We shall use the phrase *International Law* as a clearly defined term with a technical meaning useful for our present purpose. In the preceding chapter we endeavored to draw out step by step its full signification. In this chapter we have tried to show that the word *Law* can be, and has been, so defined as to make its use in connection with the rules that purport to govern the intercourse of states perfectly legitimate. To go further would involve entering upon a long

<sup>1</sup> *Ecclesiastical Polity*, I., III., i.

controversy more fit for a work on Jurisprudence than for one on International Law.<sup>1</sup> Usage is on our side, and there is no valid reason why we should disregard it. Indeed, we shall not only speak of International Law, but of International Morality also, meaning by the former phrase rules which states have expressly or tacitly consented to observe, and by the latter rules which in our view they ought to observe. Thus in passing judgment upon the conduct of a state on a given occasion, we shall be able to say it was both legal and moral, or it was legal but not moral, or it was moral but not legal, or it was neither moral nor legal. And, as if there was not in these statements a sufficient wealth of alternatives, the writings of publicists provide us with yet another. They speak of the *Comity of Nations*, meaning thereby those rules of courtesy which states sometimes accord to one another though not bound to do so by the accepted international code. We have to add, therefore, to International Law and International Morality, International Comity also. A state-act may be legal, moral, courteous, or any combination of these three.

## § 12.

The next subject to be discussed is far more important. It matters very little whether we call International Law by that name, or by one somewhat different, as long as both names signify the same thing; but it matters a great deal whether we regard it as an *a priori* inquiry into what the rules of international intercourse ought to be, or an historical investigation of what they are. Our conception of the science as a whole, and our treatment of it, both in principle and in detail, must be determined by the views we hold upon this great question; and it will be well, therefore, if we make them as clear as possible. Confused notions upon this point have been, and

Importance of the question whether International Law proceeds by the *a priori* or the historical method.

<sup>1</sup> See the author's paper on the subject in his *Essays on Some Disputed Questions in Modern International Law*.

still are, at the bottom of countless obscurities in the writing of publicists, and countless controversies among statesmen and jurists.

### § 13.

First, however, let us observe that whether we approach our science from the ethical or the historical side it will be impossible to exclude from our treatment of it all considerations derived from the opposite point of view. If we hold that our object is to discover the principles and precepts of international intercourse that are most conformable to justice and humanity, we shall still be obliged to take into consideration, from time to time, the actual practice of states, and inquire into the rules which they do in fact observe. Neither in national nor in individual affairs is it possible to decide upon what ought to be without some knowledge of what is. Just as moralists, in discussing the rules of right applicable to private life, constantly allude to the current habits and observances of mankind in such matters as contracts, marriages, sales, and the like, so those jurists who adopt in the main the view of International Law we are now discussing are obliged to refer to the practice of states in their mutual dealings, and the rules they actually obey. On the other hand, those who believe that the method of historical research is the correct one, find themselves unable to suppress moral judgments upon the facts they discover. It is necessary for them to inquire what the principles that guide states in their mutual intercourse ought to be, if their approval or disapproval is to be intelligent, and if they are to have the slightest hope of influencing opinion in the direction of their own wishes. Those comparatively few writers who have regarded International Law as an historical rather than an ethical inquiry, have not been behind their fellows in criticisms and suggestions for its improvement. Thus we see that the adoption of either view does not mean the complete exclusion of considerations drawn

Ethical considerations cannot be excluded from International Law.

from the other. We can neither theorize about the ideal without some reference to the real, nor describe the real without sometimes dwelling upon the ideal.

### § 14.

Before we proceed to the discussion of the merits or demerits of the two methods, it is necessary to remark that the great writers who founded modern International Law did not draw any clear line of demarcation between them, and many modern publicists have imitated their intellectual forefathers in this respect. Books upon International Law generally proceed upon the assumption that it is possible by reasoning from certain general principles, which are far more often assumed than proved, to discover a number of absolute rights possessed by states in virtue of their independent existence. These rights, it is asserted, are antecedent to all law, or, at any rate, to all law of human imposition. International Law recognizes them, but does not create them.<sup>1</sup> But when the writers who reason thus come to work out their subject, they fill up all the details of their systems by referring to the conduct of states under circumstances that have actually occurred. Unless, therefore, we are prepared to believe that in this particular department of human conduct what is and what ought to be coincide far more happily than in any other, we must hold that the writers in question confuse fact and theory, and only save themselves from the reproach of spinning a web out of their own brains by practically discarding, through the greater part of their works, the principles elaborately set forth at the commencement. In the chapter upon the History of International Law an effort will be made to explain how this confusion arose; and we shall find good ground for believing that the mixed mode of thought to which it owes its origin

<sup>1</sup> e.g. Hautefeuille, *Droits des Nations Neutres*, Discours Preliminaire, VI.-XVIII.



was highly beneficial in the infancy of our science, though it has long ago ceased to be anything better than a clog upon progress. For the present it will be sufficient to point out that writers who treat the subject in the manner under consideration cannot be expected to distinguish clearly between the ethical and the historical method. They mingle the two in their works, going unconsciously backwards and forwards from one point of view to the other, and too often producing in their readers a mode of thought as confused and confusing as their own. Till each conception has been clearly enunciated and sharply distinguished from the other it is impossible to give an intelligent assent to either.

### § 15.

We have already gone through the preliminary stages of defining and contrasting the rival conceptions; and it remains for us now to decide which is the correct one. If states had a common superior, the question would be easily settled. His commands would be International Law, just as within each state the commands of the individual or body of individuals possessing sovereign power make up the municipal law which each member of the community has to obey, whether he approves of it or not. But there is no central authority supreme over all states, and capable of inflicting punishment on those who disobey its precepts. The era of universal dominion is over, and independent states now recognize no earthly superior. Do they then appeal in their controversies to innate ideas of justice implanted in the mind of the human race by its Creator, or to principles acknowledged by the general opinion of statesmen and jurists?—to precepts deduced from the consideration of absolute rights existing antecedent to custom and law, or to rules which can be shown to have been adopted by all or most states? A very slight acquaintance with the history of international affairs

States appeal in their controversies to usage and precedent.

will teach us that the latter alternative is the one adopted with something approaching to unanimity. Statesmen uphold the cause for which they are contending, by reference to acknowledged rules deduced from the general practice of states. They quote the words of treaties and of authors who are universally regarded as authorities. If there are no precedents exactly applicable to the matter in hand, they endeavor to show that admitted principles, logically developed, lead to the conclusions they wish to establish. Very seldom do we find appeals to natural right or innate principles of justice and humanity. Sometimes such considerations are used to bolster up a case for which little support can be found in acknowledged principles or accepted rules. Their presence in a state paper is a pretty sure sign that International Law is hopelessly against the contentions of its authors. Speaking generally on a matter of fact which is, and must be, unaffected by any theory about International Law, we may assert that states appeal in their controversies with other states to usage, and, if usage is doubtful, to principles that have been adopted by all or most civilized nations.

### § 16.

Now we may fairly argue that this fact is decisive as to both the nature and the method of International Law. If

These appeals  
show that the  
historical method  
is the correct one.

those who have to conduct the external affairs of states appeal in controversies with other states, not to such ideas of justice as most commend themselves at the time to the parties concerned, but to a previously determined body of rules, we may feel sure that the mutual intercourse of states is governed by these rules, and that they are the subject matter of International Law. It is, therefore, an inquiry into what is, not into what ought to be. And its method must of necessity be historical, since statesmen discover what rules to apply to particular cases by an inquiry into the history of previous

cases. That these truths have not been more generally recognized is probably due to the circumstance that the writers of books on International Law have very seldom been statesmen or diplomatists. There are of course exceptions. The names of Hugo Grotius, Henry Wheaton, and Carlos Calvo will at once occur as those of men who have been distinguished both as statesmen and as publicists; but, as a general rule, one set of men administer International Law, and another set of men write about it, whereas the writers on other branches of law are almost invariably men engaged in the practical application of the rules they lay down. But, though this peculiarity has no doubt tended to keep up the confusion between speculation and fact, it has also had a good effect. But for it there would probably have been far less of scientific method in the study than there is. Statesmen and diplomatists are so occupied with the questions of the moment that they lose the power of looking at rules, not as isolated units, but as parts of one great system. Now, a writer on International Law not only has to discover and express with precision the rules which states observe in their mutual intercourse, but he has also to classify these rules under various heads, to show that they are deduced from acknowledged principles, and to point out how these principles sometimes qualify one another. It is hardly too much to say that the habits of mind of an ordinary statesman disqualify him for performing the latter of these two functions as much as they fit him for performing the former. Exactly the converse is true of ordinary publicists. They have systematized details, but have too often evolved rules and principles from the recesses of their own consciousness. The modern writer on International Law should thankfully acknowledge his obligations to his predecessors in point of systematic arrangement, while he endeavors to make clear what is obscure in their views of the nature and method of the science.

## § 17.

We have arrived at the conclusion that the method of International Law is historical rather than ethical, on the ground that those who have to administer its rules determine them mainly by a reference to precedent and usage. But there are other considerations which may be urged in support of the same position. While ethical science remains in its present condition there is no hope of a general agreement as to the nature of its standards and the mode of determining them. The existence of some of them is denied, and, in spite of eclectic tendencies, the intuitional and utilitarian schools are as far apart as ever. If it were necessary to determine the rights of states by reference to Moral Philosophy, publicists would give different versions of them according as they differed in their views of the fundamental questions of Ethics, and we should have almost as many systems of International Law as we have writers upon the subject. It is true that most of the great publicists have endeavored to determine the rights and duties of states according to principles which seemed to them just and righteous and consistent with human nature at its best, and nevertheless they have given us one tolerably uniform system and not scores of conflicting systems. But their agreement in detail does not arise from a similar agreement in principle. It is the result of a common neglect to work out with logical precision the principles on which they based their systems. As we have stated before, they refer to usage, and argue from the common consent of nations, while they more or less consciously imagine they are working out a theory of absolute right. As long as there are on the one hand a number of conflicting notions of what the rights and duties of states ought to be, and on the other hand a tolerably well-defined body of principles by which states guide their conduct, International Law must be founded on the latter, and not on the

The conclusion in favor of the historical method is strengthened by the absence of general agreement as to the basis of Ethics.

former. The principles and the rules based upon them may be morally good or morally bad ; but they determine the conduct of governments in relation to one another, they define the rights of states and set forth their obligations, and therefore they, and they alone, are International Law. To argue otherwise would be to blend the ideal with the real, to confuse what ought to be with what is, and to turn moral rightness into legal right.

### § 18.

But while we shun altogether any such confusion, and hold those rules to be International Law which states do actually observe, without regard to their goodness or badness, we do not imagine that the moral quality of these rules is a matter of indifference, or believe that writers on public law need not trouble themselves about it. All we contend for is that the question what are the rules of International Law on a given subject and the question whether they are good or bad should be kept distinct. They differ in their nature and in their method of solution, and nothing but harm can come of any attempt to unite them. Yet it is the duty of publicists to put ethical considerations prominently forward in many parts of their work. Even in a book on some portion of ordinary Municipal Law, we should expect to find expressions of opinion upon various rules, the justice of which was disputed among those competent to form a judgment. The writer, for instance, of an account of the English Criminal Law might hold strongly that it was still unjust to women in some of its provisions, and he would probably enforce his view by argument when he came to deal with those portions of his subject. Now, if no reasonable objection can be taken to such a course, it cannot be doubted that the publicist is justified in suggesting, on moral grounds, alterations in International Law where he deems it open to objection, provided always that he does not proceed to regard as law the new

The place of ethical considerations in International Law.

rule he has suggested, because he believes he has proved it to be much superior to the old. But in addition to cases of change and reform, there are other cases which must be dealt with on ethical grounds. If a point of Municipal Law is doubtful, men resort to a supreme legislature for an interpreting statute; but if a point of International Law is doubtful, they can only resort to general reasoning for a convincing argument, unless, indeed, they settle the question by blows. He who in such a case bases his reasoning on high considerations of morality may succeed in resolving the doubt in accordance with humanity and justice. International Law in many of its details is peculiarly liable to disputes and doubts, because it is based upon usage and opinion. Sometimes there are two or more diverse usages, each supported by a considerable number of precedents, and each backed up by a respectable body of opinion. Sometimes a new question arises, unlike in many respects any that have occurred before. No precedents exactly fit it, and among recognized principles there is more than one from which a rule to settle the dispute might be deduced. Indeed, our science progresses by reason of the rise of these doubtful points. After they have been discussed, debated, and perhaps fought over, for many years, a clear and consistent body of usage with regard to them emerges from the confusion, and a new collection of rules is added to International Law. The controversies of one generation produce the undoubted law of the next; and meanwhile a fresh series of difficulties has arisen, which in its turn will give birth to a new chapter of accepted law. There is great scope for argument in the settlement of these controversies; and ethical principles should be put prominently forward by all writers who deal with them. Nations are sure not to forget considerations of self-interest; but the publicist should rise above national prejudice, and endeavor so to use his influence as to make the system he expounds at the same time more scientific and more just.

## § 19.

We are now in a condition to sum up the results of a long and somewhat intricate chain of reasoning. Briefly, they are these. The controversy as to whether the term Law is properly applied to the rules of international conduct, is a mere logomachy. Summary of results arrived at in this chapter. If we follow Austin and hold that all laws are commands of superiors, International Law is improperly so called. If we follow Hooker and hold that whatever precepts regulate conduct are laws, International Law is properly so called. But since almost all writers apply the term Law to the rules which guide states in their mutual intercourse, it seems best to adopt it, on the clear understanding that the word is used in Hooker's sense. International Law proceeds first by the method of inquiry into the practices of states in their dealings with each other and into the acknowledged principles on which those practices are based. Having discovered what they are, it has next to classify them, derive rules from them, and reduce them to system. Incidentally, however, it deals with the question of what the rules ought to be, whenever a change is felt to be desirable, or a doubt has to be resolved. A writer on International Law, therefore, must cease to rely exclusively upon the method of observation and classification when he wishes to clear up a doubtful point or bring about a needful reform. For a moment his science ceases to be inductive, and he flies to general reasoning, knowing that if he convinces all concerned, he *ipso facto* resolves the doubt or changes the law. He does not set a sovereign legislature in motion: in a sense he himself legislates; for he controls the opinion that is really supreme. And this he does without deserting the positive method and confounding the ideal with the real. A rule may in time become a part of International Law, owing to the cogency of his arguments; but he must not say it is law until it has met with general acceptance and been incorporated into the usages of states.

## CHAPTER III.

### THE HISTORY OF INTERNATIONAL LAW.

#### § 20.

By common consent International Law is concerned with the usages of civilized powers. Its history is the history of that system of rules for the guidance of states in their external relations, which has sprung up among the nations of Europe and extended itself to all civilized communities outside the European boundaries. This system, in many of its most important parts, is the growth of modern times. Its fundamental principles are barely three hundred years old. But, inasmuch as several portions of modern usage, — for example, the law of maritime capture, — originated in a period long anterior to that time, and many states which now exist can trace back for centuries previous the current of their national life, it seems best to begin with the earliest records we possess of those nations whose political ideas and continuous existence have been formative influences in the development of the law which now governs the external relations of the powers of the civilized world. The little city communities of ancient Greece and the mighty republic of Rome are thus our backward boundaries. We have to begin the history of International Law with a description of the ideas current among them and the rules which guided them in their dealings with other states. This must not be held to imply that the other nations of antiquity had no foreign policy. It simply means that their interna-

The history of International Law goes back to ancient Greece and Rome. It divides into three periods.



tional activity did not directly help to bring into being either the territorial distribution of modern Europe or the ideas which dominate modern International Law. Even with the limitation just insisted upon the history of International Law is a wide and varied subject. In the short space of one chapter it will be impossible to give more than the slightest outline of it. The earlier portion, especially, can be touched upon but lightly, since it is only in the later period that the system attains anything like its modern form and present importance. Enough, however, will be said to show what are the great creative principles which have at various times governed the ideas of nations upon the subject of their mutual intercourse, how those principles arose, how they worked, and how they were superseded by others when they were no longer applicable.

The history of International Law may be divided into three periods, during each of which one fundamental idea dominated the minds of men with respect to international relations. It will be advisable to take the periods separately, though there was in fact no strongly marked boundary line between them, but each gradually shaded off into its successor. The old and the new ideas struggled awhile for the mastery, and finally the new prevailed.

## § 21.

The first period extends from the earliest times to the establishment of the universal dominion of Rome under the Cæsars. Its distinguishing mark is the belief that nations owed duties to one another if they were of the same race, but not otherwise. States as such possessed no rights, and were subject to no obligations. The tie of kinship, real or feigned, near or remote, through the father or through the mother, was the basis of all ancient society; and just as it settled the condition of the individual within

In the FIRST PERIOD — from the earliest times to the Roman Empire — states as such had no mutual rights and duties. Kinship was the basis of the relations between Hellenic communities.

the state, so it also prescribed and limited the duties of the state to other states. This comes out most clearly in the history of Greece. In the Homeric poems piracy and robbery are accounted honorable, and there is no distinction between a state of war and a state of peace. The persons of heralds were indeed respected, but this seems to have been due to religious feeling quite as much as to any sense of intertribal duty. And the same ferocity which distinguished early society appears to have continued, so far as barbarians were concerned, down to the close of the independent political existence of the states of ancient Greece. Aristotle calmly reasons that nature intended barbarians to be slaves,<sup>1</sup> and among the natural and honorable means of acquiring wealth he classes making war in order to reduce to slavery such of mankind as are intended by nature for it.<sup>2</sup> At a later period still, in the speech of the Macedonian ambassadors urging the Ætolian Council to war with Rome, occurs the passage, "Cum barbaris eternum omnibus græcis bellum est, eritque."<sup>3</sup> This was doubtless merely a rhetorical statement, but the fact that it could be made is significant. When we reflect that by barbarian was meant simply non-Greek, we see at once that the Greeks recognized no duties towards those nations who were not of Hellenic descent. But among themselves they had a rudimentary International Law based upon the idea that all Hellenic peoples, being of the same race and similar religion, were united together by bonds which did not subsist between them and the rest of the world. They were often guilty of acts of ferocious cruelty in their warfare with one another, but nevertheless they recognized such rules as that those who died in battle were to receive burial, that the lives of all who took refuge in the temples of a captured city were to be spared, and that no molestation was to be offered to Greeks resorting to the public games or to the chief seats of Hellenic worship.<sup>4</sup>

<sup>1</sup> *Politics*, I., II., VI.

<sup>2</sup> Livy, *History*, Bk. XXXI., Ch. 29.

<sup>3</sup> *Ibid.*, I., VIII.

<sup>4</sup> Grote, *History of Greece*, Pt. II., Ch. II.

When Rhodes became the great naval power of the Ægean, a maritime code arose which was called the Laws of the Rhodians, and was obeyed wherever Greek commerce extended. This code has a curious and important history. From it were derived many of the commercial and marine regulations of the Roman Emperors, and after the revival of commerce vague recollections of imperial laws were among the influences which helped to form the *Consolato del Mare*, the great maritime code of the Middle Ages, from which much of the modern law of naval capture and many modern commercial regulations are derived.<sup>1</sup>

## § 22.

Among the Romans of the Republic there is perhaps less trace of a true International Law than among the Greeks. Rome stood alone in the world. She was not one of a group of kindred states; and therefore in her dealings with other states she was rarely restrained by any notion of rights possessed by them as against herself. Many writers have considered that in her *Jus Feciale*, and in the strict rules which excluded from her armies all who had not taken the *sacramentum*, or military oath, she possessed the germs of an international code. But it is clear that these regulations sprang partly from religious feeling and partly from the love of order which so distinguished the ancient Romans. They were in no respect due to any idea that Rome had obligations towards other nations. It was the duty of the Fecials to demand satisfaction from foreign states, and to make solemn declarations of war by dooming the enemy to the infernal gods;<sup>2</sup> but the law which imposed these functions upon them was purely a matter of internal regulation, and by the time of Cicero it had ceased to be strictly observed. The rule about the military oath

Republican Rome possessed no true International Law.

<sup>1</sup> Pardessus, *Us et Coutumes de la Mer*, I., 21-34, 209-260, and II., 1-368.

<sup>2</sup> Livy, *History*, Bk. I., Ch. 32; Cicero, *De Officiis*, Bk. I., Ch. ii.

was no more intended for the protection of the enemy from lawless adventurers than is the American law of recruiting. True International Law is based upon the notion that states are mutually bound to observe certain rules in their dealings with one another. A few instances may be quoted of the use by Livy and other Roman writers of the phrase *Jus Gentium* in the sense of universal usage binding on all nations in the matter of war and negotiation;<sup>1</sup> but, in the main, Rome neither claimed for herself nor gave to other states the benefit of any idea of mutual obligation, except with regard to the faith of treaties and the safety of the persons of ambassadors.

### § 23.

The second period begins with the establishment of the universal dominion of Rome under the Cæsars, and ends with the Reformation. It is characterized by the conception that there was to be found somewhere a common superior whose commands regulated the dealings of ordinary states with each other, — a fact which of itself completely destroys the theory of absolute international rights; for among those rights that of equality is always reckoned, and we now see that for many ages International Law was based upon the doctrine of the fundamental inequality of states. The Roman Empire in its palmy days extended over the larger part of Europe, and much of Asia and Africa. Roughly speaking, it was coterminous with the world of ancient civilization. The policy of its rulers frequently left some remnants of self-government to conquered nations. Thus the Roman Emperor was the political superior of a large number of subordinate rulers, and their disputes, whether personal or national, were settled by appeals to Cæsar. Under these circumstances International Law was

In the SECOND PERIOD — from the Roman Empire to the Reformation — it was deemed that the relations of states must be regulated by a common superior. The Emperor was such a superior while the Empire was all-powerful.

<sup>1</sup> See article on *Jus Gentium* by the late Professor Nettleship in the *Journal of Philology*, Vol. XIII., No. 28.

really based upon the commands of a superior. Its precepts were laws in the strictest Austinian sense. They imposed perfect obligations, and were armed with tremendous sanctions. Universal sovereignty was a great fact. It filled men's minds with awe and wonder. The *Majestas Populi Romani* was an object of religious reverence, and the Roman state itself, incarnate in the person of its Cæsar, was worshipped as a god. It stood between the world and anarchy, it protected civilization against barbarism, it united the nations by moral and material bonds, it kept the Roman peace within its boundaries, and it held at bay beyond them the savage hordes who longed for the plunder of its rich provincial lands. No wonder, then, that its supremacy was not merely submitted to, but welcomed. No wonder that people theorized about it, and held that the existence of a common superior over all states was part of the natural order of the universe. No wonder that memories of world-wide sway were so deeply graven on the minds of men that, long after Rome had fallen, her conquerors strove to build anew the fabric of her greatness, and their chieftains could think of no alternative to tribal sovereignty but universal dominion.

While the old Roman Empire remained strong, fact and theory with regard to the settlement of disputes between nations coincided with tolerable accuracy. It must not be supposed that the Emperors issued among their laws anything like an international code. There was no room for any such body of rules, because the subordinate states could have little or no foreign policy. Their external activity was chiefly exercised in their dealings with Rome herself. In these they stood rather in the relation of suppliants to a superior than of equals treating with an equal on common ground. When dynastic disputes arose, or when one subordinate state complained of ill-treatment from another, an appeal was made to Cæsar, and his decision was final. A series of isolated judgments on such cases could give rise to no body

of rules by which international conduct could be guided; and, in fact, no such rules are to be found in Roman Law. With regard to outer barbarians the customs of Roman warfare were as severe as ever. Their tribes were beyond the pale of law. Slaughter and rapine were their portion if they resisted, and those who escaped the sword were too often sold into slavery.

### § 24.<sup>1</sup>

After the fall of the Western Empire the theory of a common superior for states still survived. Just as Greece conquered her conquerors by bringing them into subjection to her arts and her philosophy, so Rome amid the ruins of her material power enslaved the minds of the nations who no longer submitted to her yoke. The spell of her world-wide dominion was not broken by the invasions of Attila and the sack of Genseric. When the sceptre had departed from her hand, men refused to believe in what was happening before their eyes. They held that her dominion was to be eternal, as well as universal. Though Rome was no longer the seat of empire, still the Empire itself was Roman. It must live on, they thought, in some form; and so they cast about to find a power which should be a fit possessor of the world-wide sovereignty no longer centred in the city of the seven hills. At first the only substitute to be found was the decaying Empire of the East, and for many years the Roman world was ruled, in name at least, from Constantinople. But in time a more vigorous successor arose; and from the coronation of Charlemagne as Emperor by Pope Leo III. in the basilica of St. Peter at Rome, on Christmas Day, A.D. 800, the imperial power and the world-wide dominion involved in it were held to have passed to a new line of Frankish sover-

The Holy Roman Empire and the Papacy claimed universal authority during the Middle Ages.

<sup>1</sup> The substance, and often the words, of this section and the two following are taken from the author's paper on Grotius in his *Essays on Some Disputed Questions in Modern International Law*.

eigns.<sup>1</sup> The Eastern Empire put forth a feeble protest, but outside its own rapidly diminishing territories none accepted its claim to universal sovereignty. For many centuries the Romano-German Empire was believed to be a continuation of the old dominion of the city of the seven hills, and theoretically it succeeded to all the powers of its predecessor.<sup>2</sup> Practically, however, the personal character of each Emperor largely determined the nature and extent of his influence; and gradually the Papacy, which had been the chief agent in creating the new or Holy Roman Empire, became its rival in pretensions to universal dominion. The pretended gift by Constantine of all the West to the Roman Pontiff, and the very real spiritual supremacy exercised by the successors of St. Peter, formed the basis of a claim "to give and to take away empires, kingdoms, principedoms, marquisates, duchies, countships, and the possessions of all men." And this claim was not an idle boast, as was proved in 1077, when the Emperor Henry IV., the most powerful prince in Europe, humbled himself at Canossa before the great Pope Gregory VII.<sup>3</sup>

### § 25.

The International Law of the Middle Ages was influenced enormously by the conflicting claims of the Pope and the Emperor. The idea of a common superior still lingered among the nations, and greatly assisted the Roman Pontiffs in their efforts to obtain a suzerainty over all temporal sovereigns. For as the Empire founded by Charlemagne gradually decreased in extent till it scarce spread beyond the limits of Germany, more and more difficulty was felt in ascribing to it universal dominion. Yet no one dreamed of asserting boldly that independent states had no earthly superior, and therefore when the Papacy came

The idea of a common superior disappeared at the Reformation.

<sup>1</sup> Bryce, *Holy Roman Empire*, Chs. IV., V.

<sup>2</sup> *Ibid.*, Chs. VII., XII., XXV.

<sup>3</sup> *Ibid.*, Ch. X.

forward with its claims, men's minds were predisposed to accept them. As an arbitrator between states, the Pope often possessed great influence for good. In an age of force he introduced into the settlement of international disputes principles of humanity and justice; and his supernatural sanctions compelled obedience from brutal potentates who cared little or nothing for the higher law which he expounded.<sup>1</sup> Had the Papacy always acted upon the principles it invariably professed, its existence as a great court of appeal in disputes between states would have been an un-mixed benefit. But the Roman *Curia* gradually sank into such terrible corruption that the moral sense of mankind revolted against its iniquities, and the authority of the Pope became less and less, till at length a large part of Europe threw it off altogether. Both the Papacy and the Empire remained; but the theory of universal dominion received its death-blow when in the stormy period of the Reformation the two powers, one or other of which ought, according to it, to have calmed the waves of political and religious strife, were obliged to join in the turmoil. The Pope, of course, opposed the Reformers, and the Emperor took the same side. Community of religion became a new bond between states. The Protestant princes of the German Empire were often in arms against the Emperor. His authority was set at nought within the limits of his own dominions, and outside them he had long received nothing more than mere honorary precedence as the first potentate in Christendom. Thus the notion of a common superior exercising sovereign rights over all nations gradually faded away. Practically it had long been obsolete, and at length it ceased to exist.

#### § 26.

New principles were required unless states were openly to avow that in their mutual dealings they recognized no law but

<sup>1</sup> J. S. Mill, *Dissertations and Discussions*, II., 152-158.



the right of the strongest. For a time there was undoubtedly a reaction towards this view. In 1513 Machiavelli set forth in *The Prince* the doctrine that in matters of state ordinary moral rules did not apply, and his work soon became the political manual of the rulers and generals of the time. Cruel as were the wars of the Middle Ages, it is doubtful whether the long struggle between Spain and the revolted Netherlands, and the terrible Thirty Years' War, were not stained by greater atrocities than any perpetrated in the days of chivalry. But fortunately for humanity the tendency towards lawlessness in international transactions was arrested by the publication in 1625 of the great work of Grotius, *De Jure Belli ac Pacis*. In this book the new ideas which had been floating about in the atmosphere of European thought for a century or more were clearly stated, systematically arranged, and logically applied to the regulation of the mutual dealings of states. Weary of anarchy, Europe eagerly adopted a system which promised to put some curb upon the fierce passions of rough warriors and the *finesse* of polished statesmen. Thus the whole basis of International Law was changed and new principles introduced into its very foundation. They belong to our third period; but before we inquire what they were and how they were applied, it will be well to state very briefly the nature of the secondary influences which helped to mould the law of nations during the period we have just reviewed.

For a time there was grave danger of utter lawlessness in international affairs.

## § 27.

As the Roman Empire fell, the advancing tide of barbarian invasion swept away the bulwarks of civilization. Commerce disappeared; warfare was restrained by no rules; pirates swept the seas. And in the ninth century the terrible incursions of the Northmen began to add a fresh element of horror to the universal confusion. But a new and better order slowly evolved itself

Influences which made for improvement during the Middle Ages.

out of the chaos. The Christian Church softened the manners and mitigated the cruelty of the barbarian nations, as one by one they entered into her fold. The temporal power of the Holy Roman Empire and the spiritual authority of the Papacy worked together for a time in the cause of civilization. Feudalism became the great organizing principle in remodelling society. The study of Roman Law gave a magazine of new ideas and rules to statesmen and lawyers. The revival of commerce produced various codes of maritime law, of which the famous *Consolato del Mare* was the chief. Viewed in connection with international relations, the most important part of the new organization of Europe was the universal supremacy claimed by the Roman Pontiff and the Emperor, the former in the spiritual, the latter in the temporal sphere. To this we have already alluded. It may, however, be advisable to point out here that both Pope and Emperor were rather judges and arbitrators than lawgivers. They dealt with particular cases, not with general rules. There was no *corpus* of International Law till comparatively modern times. The nearest approach in the Middle Ages to any system of regulations that could be known beforehand by states was found in the various maritime codes.

### § 28.

Foremost among the secondary influences which determined the ideas of the Middle Ages upon international relations was the conception of territorial sovereignty due to feudalism. When the political rights and duties of individuals within the state came to be associated with the possession of land, it was an easy inference that the sovereign of the community, whose political functions were far larger than those of any other member of it, must have a corresponding extension given to his rights over the soil on which his people were settled. Formerly, if he could not be universal ruler, he was lord of

Importance of the  
conception of  
territorial  
sovereignty.

his people. Now, in the absence of the former alternative, he claimed to be lord of his people's lands. Thus sovereignty became territorial, a character it still retains. The influence of the change has been far greater during the modern epoch than it was in the Middle Ages, and it will therefore be considered more at length when we deal with our third period. Feudal notions lent themselves so readily to the theory of universal sovereignty that the principles contained in them could not produce any great revolution in thought with regard to international matters while that theory retained its sway. Feudalism organized society in a pyramidal form. At the base was the great mass of the cultivators of the soil. Above them came the mesne lords, above them the tenants-in-chief, and finally the king. But as there were many kings and princes in Europe, it was easy to go a step further and place at the apex of the pyramid one common superior, who was to exercise overlordship over all subordinate rulers. Throughout the greater part of Europe this superiority was conceded in theory to the head of the Holy Roman Empire, though the realm of England claimed entire independence, and her kings insisted upon the imperial character of their own royalty. But when the direct power of the Emperors became limited to Germany, their theoretical supremacy over other lands had little practical effect. Among non-Germanic rulers feudal ties and papal authority formed a rudimentary public law. Thus we find that within the Empire the rules of Roman Law still controlled the mutual relation of states, with Cæsar as supreme judge and supreme lawgiver; while outside it feudal subordination took the place of imperial authority, and when feudal ties failed the Papacy stood in the background, ready and sometimes able to settle disputes by its spiritual authority. We have already seen how, at the Reformation, the Pope and the Emperor lost even the theoretical acknowledgment of their claim to universal dominion. By that time feudalism, too, had fallen into utter decay, and the way was

left clear for the introduction of fresh regulative principles. The old order bequeathed to the new but one element, and that was the conception of territorial sovereignty. Roman Law of course remained, for it is part of the world's heritage for all time; but the portions of it that influenced the foundation of the new system were those which had been little used in the old.

### § 29.

Up to the end of the second period the usages of war were still ferocious in the extreme. About the time of Grotius we find the first beginnings of the custom of exchanging prisoners; but this great amelioration won its way to universal adoption by slow degrees. During the Middle Ages captives were often treated with detestable cruelty. For instance, in 1268 Charles of Anjou, brother of Saint Louis of France, first mutilated and then burnt alive a number of prisoners he had taken at the battle of Tagliacozzo.<sup>1</sup> The population of an invaded country were subjected to the foulest indignities, and sometimes whole districts were laid waste and turned into deserts out of sheer wantonness. When a place was taken by storm it was given up to pillage and rapine, no attempt to restrain the passions of the victorious soldiery being made by their commanders. Even the rules of good faith were frequently disregarded, though in theory their obligation was admitted. Both the rights and duties of neutrals were ill defined and loosely observed. Commerce had, however, won for itself considerable recognition. The date of the *Consolato del Mare* is very uncertain, but it cannot be placed later than the fourteenth century. And it did not stand alone; for the revival of commerce led to the growth of other maritime codes, such as the Laws of Oleron, the *Leges Wisbuenses*, and the *Coutumes d'Amsterdam*.<sup>2</sup> From that time,

Cruelty of the  
usage of war.  
Growth of  
maritime codes.

<sup>1</sup> Hosack, *Rise and Growth of the Law of Nations*, 52.

<sup>2</sup> Pardessus, *Us et Coutumes de la Mer*, Vol. II.

therefore, Europe had not only a codified *lex mercatoria*, but also a recognized body of laws for the regulation of maritime capture. Just at the close of our present period diplomacy showed signs of becoming a regular profession. The old custom of sending envoys only when some special business had to be transacted was giving place to the modern system of permanent embassies, resident at the courts of friendly nations. But though in certain parts of International Law some progress may be noted, yet, taken as a whole, the system was still very imperfect. Indeed, it cannot be called a system with any approach to accuracy. It was rather a mass of undigested, and often contradictory, precedents, and there was danger of its being entirely swept away in the great outburst of cruelty and lawlessness that arose as old restraints became inoperative, and old theories faded from the minds of men.

### § 30.

We now come to our third period, which extends from the Reformation to the present time. The basis of International Law during the whole of this period has been the principle of the absolute independence of sovereign states, and their complete equality before the law which regulates their mutual intercourse as a society of independent units.

In the THIRD PERIOD — from the Reformation to the present time — the ruling principle is that there exists a society of independent states, the members of which have mutual rights and obligations.

<sup>1</sup> When a number of equal and independent states no longer own, even in theory, a common superior, the most obvious mode of escape from utter lawlessness in their mutual dealings seems to us, with our present ideas, to be the regulation of their conduct towards one another by rules to which all have assented. But it may well be doubted whether International Law in the modern

<sup>1</sup> Much of this section and the ten following are to be found in the author's paper on Grotius, printed in his *Essays on Some Disputed Questions in Modern International Law*, but it will be seen that he has modified some of the views put forward in the earlier work.

sense would ever have existed had general consent been supposed to be necessary before its commands could claim obedience. As a matter of fact, their obligation was based partly upon the express or tacit consent of states, and partly upon the theory of the extreme sanctity attaching to the precepts of the so-called Law of Nature. The great exploit of the early publicists was to apply this Law of Nature to the intercourse of states, and thus fill up the gap caused by the disappearance of the conception of universal sovereignty. But, in addition, general consent was put forward by most of them as the ground on which certain of their rules rested. Thus from the first there were two elements in modern International Law. Some writers and thinkers gave greater prominence to the Law of Nature, others to the consent of nations, but few are to be found who deal with one element to the exclusion of the other. There can, however, be no doubt that the theory of a state and a Law of Nature was the most powerful influence in creating, shaping, and winning acceptance for the International Law which arose on the ruins of the state-system of mediæval Europe.

### § 31.

It is impossible to attempt here an account of the origin and growth of the ideas which cluster round the notion of Nature and her law. They had their birth in ancient Greece, and they are still alive and active to-day, though their vigor is not so great, or the acceptance of them so general, as it was when Hugo Grotius wrote that "the principles of Natural Law, if you attend to them rightly, are of themselves patent and evident, almost in the same way as things which are perceived by the external senses."<sup>1</sup> Such a statement as this takes away the breath of a modern jurist; but when it was first given to the world no one thought it extravagant,

The change in ideas was brought about by the work of Grotius and the theory of a Law of Nature.

<sup>1</sup> *De Jure Belli ac Pacis*, Prolegomena, § 39.

because every one who reasoned at all upon the problems of society and government accepted without reserve the theory of a Law of Nature. On this one point even Catholic and Protestant were agreed. The Jesuit casuist, Francisco Suarez, and the Oxford civilian, Albericus Gentilis, were alike in this, that they regarded Nature as a lawgiver and endeavored to interpret what they deemed her just and simple precepts to a world which stood sorely in need of them. These men were two of the most distinguished of the forerunners of Grotius. They both wrote towards the end of the sixteenth century, and from the treatise of the latter, *De Jure Belli*, the great Dutch jurist took much of the plan and arrangement of his own *De Jure Belli ac Pacis*. Indeed, so great are his obligations to Gentilis that some authorities are disposed to contest his right to be called the father of International Law. But after making all possible allowances for his debt to his predecessor, the fact remains that it was Grotius, and not Gentilis, who won the ear of the civilized world, altered its theory of international relations, and made its warfare infinitely more merciful than before. It is one of the marvels of history that this was possible. Huig van Groot, commonly called Hugo Grotius, was born at Delft, in the Province of Holland, on the tenth of April, 1583, and grew up amid the later scenes of the long struggle of his countrymen with Spain on behalf of their local liberties and national independence. He early distinguished himself both as a scholar and as a jurist, and was soon raised to public office. But the part he took in civil disputes led to his arrest by order of Prince Maurice of Nassau and the States-General in 1618. He was condemned to perpetual imprisonment, but escaped after three years, owing to the devotion of his wife, and fled to Paris, where he lived for a time on a pension granted by the French king and very irregularly paid. After some years he entered into the diplomatic service of Queen Christina of Sweden, and while engaged in the performance of a mission on behalf of the Swedish government in 1645,

he died at Rostock from the effects of shipwreck. It was while he was living at Paris that he published his great book in 1625. Its success was marvellous. Gustavus Adolphus carried a copy about with him in his campaigns. In the Peace of Westphalia its leading principles were recognized and acted upon, and when learning began to revive as the ravages of war were repaired, it was taught as public law in the University of Heidelberg.

### § 32.

How was it possible for a poor scholar, exiled from his native land and neglected in the country of his adoption, to change the ideas of mankind in a most important department of human thought? The answer to this question involves three sets of considerations. In the first place, the world was weary of the evils that sprang from the prevailing doubt as to the proper basis of international rules, or even as to their existence. The very cause which impelled Grotius to write, impelled men to listen to his voice. He says, "I saw prevailing throughout the Christian world a license in making war of which even barbarous nations would have been ashamed; recourse being had to arms for slight reasons or no reason; and when arms were once taken up, all reverence for divine and human law was thrown away, just as if men were henceforth authorized to commit all crimes without restraint."<sup>1</sup> When his book was given to the world, the worst horrors of the Thirty Years War had not taken place. The sack of Magdeburg, the brutal license and utter foulness of both sides, the tortures, the profanities, the devastations which turned the most fertile part of Germany into a desert, were yet to horrify the world. But all this and more followed in a few years; and men who had lived through a whole generation of warfare fitter for Iroquois

Causes of the  
influence exercised  
by the great work  
of Grotius.

<sup>1</sup> *De Jure Belli ac Pacis*, Prolegomena, § 28.



braves than Christian warriors were disposed to listen when one of the greatest scholars and jurists of the age told them that there was a law which set bounds to the ferocity of soldiers and bade statesmen pause before they went to war on frivolous and insincere pretexts. Yet Grotius might have pleaded in vain for justice and humanity, if he had not been able to appeal to principles universally recognized, and to show that these, when properly interpreted, commanded the precepts which he endeavored to inculcate. He applied the accepted theory of a Law of Nature to international concerns, and made all who believed in that law and its authority believe also that it condemned the practices from which they were recoiling in horror. And lastly, he brought to the performance of this great task all the powers of an acute intellect, and all the treasures of a marvellous erudition. As a scholar he was uncritical, like all the scholars of the seventeenth century; but the range of his learning was enormous. Not only did he pile up precedent upon precedent, and gather instances from all history, sacred and profane; but he digested his vast mass of matter into an intelligible system, and gave it to the world in a form which attracted men of action as well as students and thinkers.

### § 33.

We are now in a position to appreciate the meaning and importance of the Grotian version of Nature and her Law. He held that man was a being possessed of a social and rational nature, and consequently able to discern what was conformable with that nature. Natural Law was the rule of right reason, indicating that an act by its complying or disagreeing with human nature had in it a moral deformity or moral necessity, and was consequently forbidden, or commanded by God, the Author of Nature. This law was immutable. God himself could not change it, any more than He could make twice

The Grotian  
version of Nature  
and Natural Law.

two to be other than four.<sup>1</sup> Human Law might go beyond it or deal with matters which it did not touch, but could not justly contravene it. Owing to its intrinsic rightness, it ruled the intercourse of nations as well as individuals; but for the guidance of states in their relations with each other, there was, in addition to Natural Law, a Voluntary Law, based upon the consent of all or most nations. This part of the international code could vary from time to time; but the other portion was not subject to change, since it was founded upon human nature itself.<sup>2</sup>

### § 34.

When we are dealing with speculations such as these, we never know whether we are considering ethical theory or legal rule. If the Law of Nature be meant for a collection of opinions as to the proper method of regulating human conduct, well and good. We can criticise it as we could any other theory of what ought to be. But if it be meant as imperative law, we can only say that it is nothing of the kind; for it is not a body of rules actually observed among men, neither is it armed with any sanctions whereby those who obey it not may be coerced and punished. In fact, its supporters themselves had, and have, no consistent point of view whence to regard it. Their thought is mixed. They confuse the real and the ideal. At one moment Natural Law is high, and holy, and plain to be seen by all whose spiritual and mental eyesight is not dimmed by vice or folly. At the next it authorizes slavery, and does not condemn polygamy.<sup>3</sup> Translated into perfectly plain language the greater part of the arguments of those who believe in Nature and her Law would come to this: "We, and sensible people generally, approve of certain proceedings as right, and therefore they are commanded by the law of civilized

The theory of a  
Law of Nature  
criticised.

<sup>1</sup> *De Jure Belli ac Pacis*, I., I., X.

<sup>2</sup> *Ibid.*, I., I., XII.-XIV.

<sup>3</sup> *Ibid.*, II., V.

mankind, and all are bound to adopt them." Bluntly stated in this fashion, the theory would command few supporters. It is only when it is dressed in high-sounding phrases, such as "eternal and immutable justice," and "principles implanted by the Creator in the heart of man," that it becomes attractive. Natural Law, as described by Grotius, may be the standard at which International Law should aim, but it certainly is not International Law. Indeed, the boasted agreement of all men with regard to it never existed, even among philosophers. Grotius held that it was based upon man's social instincts and capacity for discovering and acting upon general principles. Hobbes argued that by nature man was an anti-social animal, who fought, and bit, and devoured his fellows.<sup>1</sup> Grotius declared that God Himself could not alter Natural Law. Pufendorf based Natural Law upon the commands of God.<sup>2</sup> The theory will not bear analysis. If Natural Law is but another name for the sense of right which grows as man progresses, and sets before him through the ages an ideal of life and conduct ever increasing in nobility, let us place it where it properly belongs, in the Science of Ethics; but let us not attempt to thrust it into Jurisprudence, and confuse our minds by speculating upon it as if it were a branch of law. Doubtless, men do often observe rules which they ought to observe; but, nevertheless, the arguments which convince us that a rule is right are quite distinct from the researches which show us that it is part of human law and the classifications which determine its proper place among other rules of a similar kind.

### § 35.

The theory of a State of Nature was generally held along with the theory of a Law of Nature. It was believed that there had once existed on the earth a time when organized

<sup>1</sup> *Elements of Law*, Ch. XIV.

<sup>2</sup> *Law of Nature and Nations*, Bk. II., Ch. iii., § 20.

political societies were not yet formed, and each individual was at liberty to do what was right in his own eyes, unrestrained by human law. In this condition men obeyed a few just and simple rules discovered by their own unassisted reason.

The connection between the theory of a State of Nature and the theory of a Law of Nature.

These rules were called Natural Law, because they were implanted by Nature in the breast of each individual, and did not depend for their obligation on the sanctions of any external authority. The details of the picture varied according to the taste of the writers. No two descriptions of the State or Law of Nature were exactly alike; but every one agreed in asserting that it was impossible to doubt their existence. From various indications it seems clear that Grotius shared the common belief of his day as to the condition of the human race in its infancy; but he certainly did not put it prominently forward in his account of Natural Law, or base upon it an argument for the applicability of that law to matters international. This was done by his successors; and if we accept their premises, it is difficult to reject their conclusion. They argued that since man, when he had no government over him to set him laws, found rules for his conduct in the dictates of Nature, independent states, being permanently in the position of having no common superior, were permanently bound by Natural Law. The whole theory is false and unhistorical. There never was a time when each man lived his own individual life, without connection with his fellows, and without feeling the yoke of any external authority. The more we are able to discover about the facts of primitive society, the more clear does it become that primeval man was subject to numerous and galling restrictions in every department of life. Custom and superstition environed him like an atmosphere. He could not escape from their pressure, and he had no wish to do so. The picture of the primitive savage as a being absolutely free to follow his own impulses and determine his own lot is historically false; just as the picture of him as an individual endowed with lofty senti-

ments, and exercising a calm and passionless reason to discover the best rules of human conduct, is psychologically foolish.

### § 36.

But untenable as is the theory of a Law of Nature, whether or no it be linked with the twin theory of a State of Nature, it performed a great service to humanity when it induced the statesmen and rulers of the seventeenth century to accept the system of International Law put forth by Hugo Grotius.

The effect of the two theories in obtaining acceptance for an improved International Law.

They had all been taught that Natural Law was specially binding in its character, and believed that men could not violate it without sinking to the level of the beasts. When they found it applied by a great thinker to the regulation of international relations, and discovered that, so applied, it forbade the practices of which they were more than half ashamed, and placed restraints upon that unchecked fury which had turned central Europe into a veritable pandemonium, they were disposed to welcome and adopt it. The times were out of joint. The old principles which had regulated the state relations of mediæval Christendom were dead. The attempt to get on without any principles at all had been a costly and bloodstained failure. New principles were presented, clothed with all the authority of admitted theory. It is not to be wondered at that they were eagerly received, and became in a short time the foundations of a new international order. In so far as they are theoretical and connected with Nature and Natural Law we have already examined them and found them to be wanting. But we have yet to discuss them on their practical side, and in this aspect we shall discover that they are worthy of the highest admiration.

### § 37.

The great practical principle of Grotius was the independence of sovereign states. He gave up, even in theory, the

worn-out doctrine of a temporal and a spiritual head of Christendom. There was no common superior, whether Emperor or Pope, with a right to exact obedience from the nations.<sup>1</sup> Each state was absolutely independent of any external human authority, and as a corollary all were equal before the law which Nature and common consent imposed. This is the fundamental doctrine of modern International Law. We speak of a family of nations, a society of independent units termed states, where our ancestors spoke of a world-empire and a world-church; and we look for the rules of our society in the express or tacit consent of the units of which it is composed, whereas they looked to the decisions of some mighty head, armed by heaven itself with either the temporal or the spiritual sword.

Grotius insists on the independence of states and the territorial sovereignty of rulers.

The second of the great practical principles which form the basis of International Law as we understand it is the doctrine of territorial sovereignty. This was not introduced into the science by Grotius. As we have already seen,<sup>2</sup> it was due to feudalism, which associated political rights and duties with the possession of a portion of the earth's surface. But the Grotian system took away from it those limitations which had done much to soften its application in mediæval times. The power of a feudal lord was bounded not only by the rights of his superior, if he had one, but also by the rights of those who held their land of him. The relation between them was a legal one, based upon contract, and involving mutual rights and obligations which the inferior as well as the superior could test in a court of law. Modern International Law, on the other hand, regards sovereigns, or, in other words, supreme governments, as absolute owners of the state's territory in their relations with each other, however restricted their power may be with regard to the land of their subjects in all internal transactions. A ruler who cannot take an inch of ground from the humblest of his subjects to

<sup>1</sup> *De Jure Belli ac Pacis*, II. ; XXII., xiii. and xiv.

<sup>2</sup> See § 28.

round off his own domain, may cede a whole province to a brother ruler without any regard for the wishes of its inhabitants, though Grotius denied that he possessed this power unless his kingdom was patrimonial.<sup>1</sup> In all transactions between states where cession of territory is involved, whether the transfer be just and necessary or selfish and uncalled-for, the documents are worded as if the lands in question belonged to the rulers in absolute proprietorship. In states where government is carried on by consent of the governed, this is no more than a legal form, since so important an act as the acquisition or cession of territory is not likely to be performed without at least the acquiescence of the people. But it is hardly possible to avoid the conclusion that the simplification of the doctrine of territorial sovereignty, by taking away from it all qualifying elements, did something to help on the development of autocratic notions of government. It is powerless for evil now, for all it means is that the proper organ of the state should speak on its behalf; but was it quite so harmless in the age of Louis XIV.? In external matters to-day the doctrine does little more than provide appropriate forms for solemn international acts, but it has an internal aspect also, on which we will for a moment proceed to dwell. In this connection it deals with jurisdiction, and asserts that the local sovereign has authority over all persons and things within his territory. How important this assertion is, and how closely it affects countless matters of everyday life, we shall see when we come to deal with the subject of a state's jurisdictional rights.<sup>2</sup> Meanwhile we will endeavor to discover why the principle of territorial sovereignty came to receive the vast extension of which we have been speaking.

### § 38.

The solution of the problem propounded above is to be found in the resort of Grotius to Roman Law for many of the

<sup>1</sup> *De Jure Belli ac Pacis*, I., III., xii.-xiii.

<sup>2</sup> See §§ 113-119.

rules of his international system. It had influenced the ideas of the Middle Ages as to the relations of states; but its power was felt chiefly within the Holy Roman Empire, whose lawyers deemed that the unlimited authority given to the Cæsars by the *Jus Civile* belonged of right to every Emperor who had been crowned and anointed in the city of the seven hills. This notion ceased to regulate the intercourse of commonwealths in proportion as they succeeded in obtaining a practical freedom from imperial authority, and when the doctrine of a common superior perished out of the international code, there was no further use for rules which implied its existence. But the man who expelled them from the external politics of Christendom, introduced at the same time a mass of rules drawn from another portion of the Roman legal system. Cæsar's power was defined by the *Jus Civile*. Grotius laid the *Jus Gentium* under contribution. We cannot here enter into the disputed question of the exact meaning attached by the Roman lawyers to this famous phrase;<sup>1</sup> and till that question is satisfactorily settled, it will be impossible to decide whether Grotius did, as Sir Henry Maine asserts,<sup>2</sup> borrow from the *Jus Gentium*, under the mistaken impression that it was a body of rules framed for the regulation of international concerns, and based upon Natural Law, or whether, as other writers claim,<sup>3</sup> he regarded it as Universal Law, based upon the precepts of reason, and was right in so doing. Certain it is that he adopted into his system rule after rule of the *Jus Gentium*, and declared that they were part of that Natural Law which all mankind were bound to obey. Rightly or wrongly, the Roman Law of Nations was used to build the fabric of the Grotian Law of Nature. It is

The rules laid down by Grotius with regard to dominion, were taken from the Roman *Jus Gentium*.

<sup>1</sup> An examination of the views of modern scholars will be found in the *Journal of Philology*, Vol. XIII, No. 26, in an article on *Jus Gentium* by Professor Nettleship.

<sup>2</sup> *Ancient Law*, Ch. IV.

<sup>3</sup> e.g. Walker, *Science of International Law*, Ch. IV.



of little moment to students of International Law whether the materials were taken under a misapprehension of the meaning of a Latin phrase, or whether their appropriator was grammatically and logically justified in laying his hands upon them. The important point for us is that he took them. They became part and parcel of his system, and his system became the public law of the civilized world. Now, the *Jus Gentium* regarded ownership as absolute. Proprietors under it possessed their lands by as unrestricted a right as they possessed their money or their clothes.<sup>1</sup> The thing itself was theirs, not a greater or less interest in it. Forms of limited ownership existed, but they were regarded as exceptional. The typical Roman proprietor was the *dominus*, and his rights were absolute and complete. Grotius applied to international transactions the rules which in Roman Law governed the acquisition of private property, and thus deprived the notion of territorial sovereignty of its ancient checks and limitations. At the same time and by the same means he furnished the rulers of Europe with instruments for dealing with a set of new problems which were daily becoming more urgent.

### § 39.

The discovery of America had resulted in a vigorous scramble for its territories among the maritime nations of the Old World. Spaniards, French, English, and Dutch fought, annexed, and colonized, wherever the skill of their seamen and the valor of their explorers carried their national flags. They claimed enormous tracts of country on the slightest pretexts, and settled their disputes upon the spot by surprises and massacres. The scanty international code of the Middle Ages could deal with questions of vassalage and supremacy, and settle the legal effects of the conquest or cession of territory; but it was powerless to decide what acts

The Roman Law principle of *occupatio* provided rules for the acquisition of territory in the New World.

<sup>1</sup> Justinian, *Institutes*, II., i.; Gaius, *Institutes*, II., §§ 40-96; Austin, *Jurisprudence*, II., 817-818.

were necessary in order to obtain dominion over newly discovered territory, or how great an extent of country could be acquired by one act of discovery or colonization. Questions of this kind had never agitated mediæval Europe, because all the territory with which its rulers had any practical concern was already possessed by states sufficiently alike in sentiment and organization to be capable of entering into mutual relations. The discovery of a new continent by Columbus and his successors brought them to the front; and the convenient doctrine that Christian states might possess themselves of the lands of the heathen and the infidel deprived the inhabitants of these vast territories of all right to consideration, even when, like the Peruvians and the Mexicans, they had developed for themselves a complex and striking civilization. Grotius found in the *Jus Gentium* a number of rules dealing with what were called Natural Modes of Acquisition, and applied them to the problems of annexation and settlement. The Roman lawyers held that *res nullius* were naturally acquired by *occupatio*, under which term they included both the physical act of seizing the thing, and the mental act of intending to keep it as one's own. Among *res nullius* they reckoned islands rising in the sea.<sup>1</sup> Grotius had only to turn to his authorities, and he was ready with a number of rules of acquisition obtained, as he and his readers believed, from Natural Law, but really a transcript of those parts of the law of Rome which regulated private ownership amid the conditions due to the volcanic changes so common in ancient Italy.<sup>2</sup> The new rules raised at least as many questions as they solved; but it was a triumph to have induced the colonizing nations to appeal to anything beyond brute force.

#### § 40.

Much of the Grotian system had existed before the time of Grotius. He gave shape and symmetry to fugitive ideas and

<sup>1</sup> Justinian, *Institutes*, II., i., 22.

<sup>2</sup> *De Jure Belli ac Pacis*, II., III.

worked out in detail rules and principles which others had propounded in a disconnected and fragmentary condition. His great book is one of the few that may be said to have altered the history of the world. The cruel customs of warfare in vogue when he wrote were rapidly superseded by the humaner precepts he laid down. The difference between the conduct of troops and commanders in the Thirty Years War and in the War of the Spanish Succession is like the difference between darkness and light;<sup>1</sup> and it is mainly due to the fact that in the interval of half a century between the two world-conflicts, the exiled Dutch jurist had become the great authority upon the regulation of international affairs. The principles he laid down achieved a rapid triumph. The Peace of Westphalia of 1648 is the monument of their earliest victory. It was the first of that series of great public instruments which have regulated the state-system of Europe down to our own time. It recognized the independence of each separate state, even within the boundaries of the Empire. The equality of states and the territorial character of sovereignty were ideas involved in the arrangements that it made, and it showed the possibility of settling the gravest disputes between nations by mutual agreement arrived at through the machinery of a congress, and embodied in comprehensive treaties.

The principles of Grotius triumphed in the Peace of Westphalia.

#### § 41.

Since 1648 modern International Law has had no rival system to contend with. It has been enriched by many new rules, and some of its original precepts have given place to others generalized from the changed practice of modern times. But the continuity of its life has never been broken, and there seems no prospect of any revolutionary change passing over it.

Since 1648 International Law has developed on the lines laid down by Grotius.

<sup>1</sup> Bernard, Paper on "Growth of the Laws of War," in *Oxford Essays for 1856*, pp. 100-104.

Perhaps the most important chapter that has been added to it is one which deals with the rights and duties of neutrals. Grotius left that portion of his subject very incompletely worked out, and for a long time the practice of nations showed conclusively that they felt themselves bound in the matter by no clearly defined rules. Even now, though the rights of a neutral state can be formulated with tolerable precision, its duties are very difficult to define. A detailed account of the growth of International Law during the past three centuries would fill a lengthy volume. It is impossible to attempt anything of the kind within the limits of the present treatise. The great fundamental principles of national independence and state sovereignty still meet with universal acceptance; and, though the theory of a Law of Nature has been discredited owing to the attacks of historical and analytical jurists, the system of Grotius rests secure upon the alternative foundation of general consent. Slowly, and almost imperceptibly, additions are made to it, as the public opinion of the civilized world decides new cases, or grows to greater heights of humanity and justice. Perhaps the careful student will be able to discern something of the process of its development as he reads in the following pages a brief outline of its present rules.

## CHAPTER IV.

### THE SUBJECTS OF INTERNATIONAL LAW.

#### § 42.

THE meagre proposition that the Subjects of International Law are Sovereign States is often put forward as if it contained all the information that need be given about the matter. But while Sovereign States are by far the most important class among the units to which our science applies, there are other communities which come under its rules to a greater or less extent, and in some cases corporations and individuals are subject to it. Even with regard to Sovereign States themselves a great deal has to be said before the fact of their subjection to International Law can be fully explained and exhibited in all its aspects.

List of the Subjects  
of International  
Law.

It will be best to take the various classes of subjects separately and deal with each in turn. We shall have to consider the following list:—

- (1) *Sovereign States.*
- (2) *Part-Sovereign States.*
- (3) *Civilized Belligerent Communities not being States.*
- (4) *Corporations.*
- (5) *Individuals.*

All these are subjects of International Law, some fully, others only to a small degree and in exceptional circumstances. An attempt will be made in this chapter to explain the relation in which each stands to the public law of the civilized world.

## § 43.

We begin with *Sovereign States*. In order clearly to understand their nature and the nature of their subjection to

*Sovereign States.* International Law, it will be necessary to pass through an ascending series of conceptions, beginning with the comparatively rudimentary one of a state. A state may be defined as *A political community, the members of which are bound together by the tie of common subjection to some central authority, whose commands the bulk of them habitually obey*. This central authority may be vested in an individual or a body of individuals; and, though it may be patriarchal, it must be something more than parental; for a family as such is not a political community and therefore not a state. The methods by which the central authority is created are outside our present subject. Whether a political community is governed by a line of hereditary monarchs, or by persons elected from time to time by the votes of a greater or less number of its members, it is a state provided that the obedience of the bulk of the people is rendered to the authorities. If there is no such obedience, there is anarchy; and in proportion as obedience is lacking the community runs the risk of losing its statehood. A mere administrative division of a greater whole, such as a French Department or an English County, would not be called a state; but we should not refuse the title to a community like Canada which is not entirely free from political subjection, though we should probably indicate the absence of complete self-government by speaking of it as a Dependent State.

We have seen what is meant by a state. If we add to the marks already given in our definition of it, the further mark that the body or individual who receives the habitual obedience of the community does not render the like obedience to any earthly superior, we arrive at the conception of a *Sovereign or Independent State*, which possesses not only internal sovereignty, or the power of dealing with domestic affairs,

but external sovereignty also, or the power of dealing with foreign affairs. The commonwealths which compose the American Union possess all the features we have enumerated as the distinguishing marks of states. They are, therefore, rightly so called; but historical and political reasons have sometimes caused them to be alluded to as Sovereign States. Strictly speaking, this is a mistake. By the Constitution of the United States all dealings with foreign powers are left to the central government. The Executive and Legislature of any and every state in the Union are devoid of the slightest power to act in these matters, and have to submit to what is done by the authorities at Washington. They have none of the attributes of external sovereignty. They cannot make war or peace, nor can they send agents to foreign powers or receive agents from them. In other words, they are states, but they are not Sovereign States.

But it is not necessary in order that a society may be a Sovereign State that its ruler or rulers should never submit to the will of others. In fact, the most powerful empires in the world frequently modify their course of action in deference to the wishes of neighboring states; and no one dreams of asserting that they lose their independence thereby. It is only when such submission becomes habitual that the state so hampered ceases to be fully sovereign. When Russia, for instance, in 1878, consented to take back the Treaty of San Stefano, which she had made separately with Turkey, and to allow all the Great Powers to settle the questions at issue in the East by an instrument negotiated at Berlin, she did nothing to impair her sovereignty. But if it were part of the public law of Europe that every treaty made by Russia must be referred to an European Congress, it would be impossible to regard her as a fully independent state. The characteristics, therefore, of a Sovereign State are two. Its government must receive habitual obedience from the bulk of the people and it must not render habitual obedience to any earthly superior.

## § 44.

But before a Sovereign State can become a *Subject of International Law* it must possess other marks in addition to

Only the more civilized Sovereign States are subjects of International Law.

those we have just enumerated. A wandering tribe with no fixed territory to call its own might nevertheless obey implicitly a chief who took no commands from other rulers. A race of savages settled on the land might be in the same predicament. Even a mere fortuitous concourse of men, like a band of pirates, might be temporarily under the sway of a chief with unrestricted power; or a very minute group ruled in civilized fashion might exist in some remote corner of the globe. Yet none of these communities would be subject to International Law, because they would want various characteristics, which, though not essential to sovereignty, are essential to membership in the family of nations. For there are many communities outside the sphere of International Law, though they are independent states. They neither grant to others, nor claim for themselves the strict observance of its rules. Justice and humanity should be scrupulously adhered to in all dealings with them, but they are not fit subjects for the application of legal technicalities. It would, for instance, be absurd to expect the king of Dahomey to establish a Prize Court, or to require the dwarfs of the central African forest to receive a permanent diplomatic mission. Since then there are in existence communities which have all the attributes of independence, and yet are not received into the family of nations, it is necessary to inquire what further marks a community must possess, over and above the marks of sovereignty, before it can take its place among those states whose intercourse is regulated by the highly developed system of rules which we call International Law. It is evident, in the first place, that a certain degree of civilization is necessary, though it is difficult to define the exact amount. The strongest evidence of the willingness of some



enlightened chief of South Sea Islanders to conform to civilized usages in the matter of international intercourse would in all probability be insufficient to induce the governments of Europe and America to deal with him as they deal with one another. On the other hand, Turkey, China, and Japan were formally placed under International Law as soon as they expressed a desire to submit themselves to it. In matters of this kind, no general rule can be laid down. The area within which the law of nations operates is supposed to coincide with the area of civilization. To be received within it is to obtain a kind of international testimonial of good conduct and respectability; and when a state hitherto accounted barbarous desires admission, the leading powers settle the case upon its merits. In addition to the attainment of a certain, or rather an uncertain, amount of civilization, a state must have possession of a fixed territory before it can obtain the privilege of admission into the family of nations. The rules of modern International Law are so permeated from end to end with the idea of territorial sovereignty that they would be entirely inapplicable to any body politic that was not permanently settled upon a portion of the earth's surface which in its collective capacity it owned. Even if we could suppose a nomadic tribe to have attained the requisite degree of civilization, its lack of territorial organization would be amply sufficient to exclude it from the pale of International Law. But a civilized and independent community, settled upon a tract of land, may be so small that it would be absurd to clothe it with the rights and obligations given by the law of nations to Sovereign States. Such a minute community might exist unnoticed in some distant corner of the world. This is actually the case with the inhabitants of Pitcairn Island,<sup>1</sup> a little rock in the South Pacific, peopled by a few score descendants of the muti-

<sup>1</sup> Pitcairn Island is now a part of the British Empire, being under the supervision of the Governor of New South Wales. But the inhabitants practically manage their own concerns; and their connection with the mother country is maintained by an occasional visit from a British man-of-war.

neers of the Bounty, who settled upon it in 1790. Here we have a community which possesses a fixed territory ; but it is so small, so remote, and so unimportant, that it remains unnoticed by civilized states, except for an occasional visit from one of their ships. When such communities exist in close contiguity to larger political bodies, they are soon absorbed altogether, or reduced to a position of dependence, or perhaps united with similar communities in a Confederation. When they are far away from the main currents of political and commercial life, they are allowed to rest unnoticed and undisturbed. A body politic completely supreme over all its members, and subject to no external authority, must have reached a certain degree of civilization, have ceased to be nomadic and become owner of a fixed territory, have provided for the continuity of its existence, and have attained a certain size and importance, before it can be regarded as one of those Sovereign States which are Subjects of International Law.

#### § 45.

The Sovereign States which are Subjects of International Law are regarded as units in their dealings with other states.

State-life and its continuity. The different kinds of Confederation. They are corporate bodies, acting through their governments. Each state is bound by the engagements entered into by its rulers on its behalf, as long as they have been made in accordance with its own law and constitution. Other states have no right to dictate what individual or body in a state shall conduct its external affairs. As long as there is such an individual or body of individuals, they must transact their business with him or them. If no such authority exists, they can decline to transact business at all ; and if a state remains for any length of time in such a condition of revolution or anarchy that no one has authority to speak on its behalf, it will soon cease to be a Subject of International Law in its existing form, though in all probability its territory and people will enter into new combinations and still retain under changed conditions some place in the ranks of civilized states. The

continuity of a state, and consequently its liability to be called upon to fulfil the international obligations it has contracted, is not affected by change of government or loss of outlying territory. But if it splits up into several states, or is obliterated altogether like Poland, or enters with others, like each of the American colonies whose independence was recognized by Great Britain in 1783, into a union for the formation of a new state, it loses its corporate existence as a Subject of International Law. When this happens, the circumstances of each case decide what is to become of the debts and other obligations with which the lost state was burdened. In some instances they disappear with the body corporate to which they belonged; in others an equitable division of them is made. The law of nations lays down no clear rules with regard to these matters; but it does clearly say that if a state desires to have intercourse with other states, there must be some authority within it capable of pledging it to a given course of conduct.

This is true of Confederations no less than of states which are organic wholes in their internal organization. Confederations are generally divided into two kinds, for neither of which is there a good term in the English language. The first, called in German a *Bundesstaat*, comprises those unions in which the central authority alone can deal with foreign powers and settle external affairs, the various members of the Confederation having control over their internal affairs only. In the second, called a *Staatenbund*, are included all Confederations where the states which have agreed to unite have retained for themselves the power of dealing directly with others in some matters, the remaining external affairs being reserved by the federal bond to the central authority.<sup>1</sup> Unions of the first kind have been called Supreme Federal Governments, unions of the second kind Systems of Confederated States.<sup>2</sup> The best examples of the former now in

<sup>1</sup> Heffter, *Das Europäische Völkerrecht*, §§ 20, 21.

<sup>2</sup> Austin, *Jurisprudence*, I., 264.

existence are the United States of America and the Swiss Confederation. No good example of the latter remains to the present time; but the German Bund from 1815 to 1866 exhibited to the world in full perfection the disadvantages of this kind of union. From the point of view of International Law, a *Bundesstaat* does not differ from an ordinary Sovereign State. It forms but one state in relation to foreign powers, though internally it may consist of many states. But as these states have no right of sending and receiving diplomatic missions, or making peace or war, foreign powers have as little to do with them as they have with the administrative divisions of an ordinary state. The case of a *Staatenbund* is different. It is a bundle of separate states, each of which retains some of the rights of external sovereignty while it is deprived of the remainder. Accordingly the states which compose it must be placed by International Law among those part-sovereign communities which we have to consider as the second class among its subjects. They are something more than administrative divisions of a larger whole. They are something less than Sovereign States.

It is sometimes exceedingly difficult to refer a given Confederation to either of the types depicted above. The Swiss Confederation, for instance, was at its inception a union of the looser kind. It is now a Supreme Federal Government, or *Bundesstaat*. But at certain periods of its history it could hardly have been called one or the other with any regard to accuracy. At the present time the new German Empire, which was constituted in 1871 in consequence of the successful war with France, is in much the same predicament. The central authority makes war and peace, sends and receives ambassadors, and negotiates treaties for political and commercial objects. But the governments of some of the states which form the empire have the right of accrediting diplomatic representatives to foreign powers and receiving representatives from them to deal with matters not reserved to the Imperial Government. Moreover, Bavaria

and Saxony have ministers for foreign affairs. Probably the diplomatists in question are not overwhelmed with work; for it is difficult to discover in the Constitution of the Empire any matters left for them to deal with. But since a right of separate diplomatic intercourse with foreign powers is vested in the more important of the federated states, we are unable to say that the Confederation is a true *Bundesstaat*, however insignificant the deflections from that type may be. At the same time, it is equally impossible to call it a *Staatenbund*, in view of the fact that for all practical purposes the central authority alone transacts the external business of the Union.<sup>1</sup> There can, however, be no doubt that, if the Confederation lasts, the subordinate states will rapidly lose whatever control over their relations with foreign powers they may still possess.

#### § 46.

States may be united without being called Confederations. In fact, writers on International Law generally enumerate a considerable number of such unions, and go <sup>Other unions between states.</sup> out of their proper province to describe minutely the various ways in which states which once were separate entities may be brought together under a common monarchical head. It is, however, obvious that such inquiries are outside our subject. As long as a state acts as a unit in its dealings with other states, International Law has no need to ask whether in internal affairs it is one state, or two, or a hundred. For instance, the fact that Austria and Hungary possess separate internal administrations does not make the international position of the Austro-Hungarian Empire different in the slightest degree from that of states like France or Prussia, which are internally organic wholes. For the purposes of International Law, it need not be distinguished from them and put into a separate class as what is termed a Real Union. For the writer on Constitutional Law

<sup>1</sup> *Statesman's Year Book for 1894*, pp. 531-534.

the distinction is important; but to the publicist it is unnecessary and unmeaning. A similar remark may be applied to the case of Personal Unions. These, strictly speaking, are not Unions at all. They are said to arise when the same person happens to be the head of the state in two or more independent political communities. But since each of these communities retains unimpaired all the powers of sovereignty, and neither is legally affected in any way by the other as regards its dealings with foreign powers, it is clear that the so-called Union can have no existence in the eye of International Law. The example of a Personal Union generally given is the case of England and Hanover from the accession of George I. to the death of William IV. During that period the King of England was also Elector of Hanover; but each state retained its separate and independent sovereignty. Except when the French occupied Hanover in 1803 at the outbreak of war with England, foreign powers made no attempt to include one in their arrangements with regard to the other; and as a matter of fact, Hanover was often at peace while England was at war. The union of the two was a mere figment. They were as much separate after the House of Hanover obtained the throne of England as they were before. Just as International Law ignores Real Unions because the states joined together by them are for its purpose but one state, so it ignores Personal Unions because the states deemed to be united by them are for its purposes separate and independent states.

#### § 47.

We are now able to assign the different classes of Unions and Confederations their proper places among the Subjects of International Law. The only kind that requires to have a special position given to it is a *Staatenbund* or System of Confederated States. In it both the Union itself and the separate

International Law deals with such cases only when there is a division of the powers of external sovereignty.

political communities which compose it must be regarded as being without a portion of the full powers of external sovereignty, while they possess the remaining portion. They will, therefore, be considered as a particular variety under the head of Part-Sovereign States. At present, our concern is with wholly Sovereign States. Among these, we class Supreme Federal Governments, Real Unions, and the states that are erroneously supposed to be joined together in Personal Unions. International Law can make no distinction between them and the Sovereign States which are internally organic wholes; for it deals only with external relations, and does not concern itself with internal organization.

#### § 48.

But though, for the reasons just given, we decline to make the distinctions between Sovereign States usually made by writers on International Law, there is a distinction hitherto generally overlooked, which is most important in itself and promises to have most far-reaching effects. The Great Powers of Europe, as they are called, have gradually obtained such a predominant position as to render untenable the proposition that there is no distinction between them and other Sovereign States; and the position they hold in Europe is held by the United States on the American continent. The doctrine that all states are equal before the law has rarely been challenged since the days when Grotius made it one of the fundamental principles of his system. It has always been admitted that the more powerful a state is the more influential it will be; but it has been denied that superiority in power and influence gave it any greater rights under International Law than were possessed by the smallest and weakest of independent political communities. But if the principles of the law of nations are really to be gathered, as we have been contending, from the practice of nations, whenever that practice is consistent

The Great Powers of Europe and the United States of America differ in some degree from ordinary Sovereign States.

and uniform, it is time to alter our statement of principle in deference to the logic of established facts. For during the greater part of the present century, Great Britain, France, Austria, Prussia, and Russia have exercised a kind of superintendence over certain European questions under the name of the Great Powers ; and in 1867 Italy was invited to join them. The same period has witnessed the rise of the United States into the position of unofficial leader and protector of the other independent republics of America. We do not for a moment claim for the Great Powers of Europe or for the United States greater rights in ordinary matters than those possessed by other members of the family of nations. Their ships have no more privileges in the ports of foreign countries than the ships of Denmark or Greece. Their powers of jurisdiction over foreigners are no greater than those of Belgium or Honduras. The immunities of their diplomatic ministers are not one whit larger than those of Portugal or Chili. International Law gives the Great Powers no more rights in their individual capacity than the smallest and weakest of their fellows. But collectively they act in the questions over which they have gained control pretty much as the committee of a club would act in matters left to it by the rules of the club. That is to say, they possess a regulative authority and are deemed to speak for the whole body of European states. But in the case of a club committee its powers are granted and defined by rules which the members of the club have formally adopted, whereas the Great Powers can show in support of their authority only the tacit consent of other states. Consequently its limits are vague and indefinite, and its procedure is ill-defined. But a review of the international history of the century will show that it is none the less real and effective. When we come to deal with the Equality of States, we shall endeavor to prove this proposition in detail, and also to show that what is true in Europe of the Great Powers is true in America of the United States.<sup>1</sup> Meanwhile, we

<sup>1</sup> See §§ 135, 136.



will divide the Sovereign States who are Subjects of International Law into two classes. The six Great Powers and the United States of America we place in the first class, and in the second the remainder of the body of Independent and Sovereign States. For the reasons already mentioned, we regard as inapplicable the usual divisions. Confederations and Unions either do all their external business through one government, or they do not. If they do, they are in the eye of International Law exactly like other Sovereign States. If they do not, the political communities which compose them are either wholly independent or part-sovereign. In no case, are they a special kind of Sovereign State, requiring to be distinguished from the rest by any peculiarity in their external relations.

#### § 49.

The questions connected with *Part-Sovereign States* next demand our attention. Though, as a general rule, the domestic government in a political community exercises over the members of that community Part-Sovereign States. all the powers of sovereignty, it is obvious that it might exercise a portion of them only, the remainder being vested in the government of another country, or given to some central authority, or even suspended altogether. When the powers thus shared concern internal affairs, International Law has nothing to do with the case; neither has it when the home government deals with internal affairs, and the other government possesses complete control of foreign relations, though both cases are important to the student of Constitutional Law and must be carefully classified by him. But when the external affairs of a community are directed partly by its domestic rulers and partly by the rulers of another country, International Law recognizes in that community a state unlike fully independent states, seeing that the rulers cannot exercise all the powers of external sovereignty, and yet capable of being ranked among its subjects, seeing that

the local government does control some portion of the relations with other states. Communities of this kind are generally distinguished from independent states by the epithet Semi-Sovereign; but as the term seems to imply an equal division of the powers of sovereignty between the local and the foreign rulers, we will use instead the adjective Part-Sovereign, since it more correctly describes a class of communities in which any proportion of the powers of external sovereignty, from nearly all to almost none, may be possessed by the home government.

The Part-Sovereign States known to International Law may be defined as *Political Communities in which the domestic rulers possess a portion only of the powers of external sovereignty, the remainder being exercised by some other political body, or even suspended altogether*. When a political community is obliged to submit itself habitually in matters of importance to the control of another state, it is said to be under the suzerainty of that state and is in a condition of part-sovereignty. When a number of political communities have joined themselves together into that loose form of Confederation which is called a *Staatenbund*, each of the states thus confederated, and also the central authority of the Confederation, are, as we have already seen, in a condition of part-sovereignty. When a state is neutralized by a great international treaty, and is therefore deprived of the right of making war for any other purpose than the defence of its own territory from attack, it is in a condition of part-sovereignty. We thus obtain three divisions of Part-Sovereign States, and it will be convenient to consider each division separately. But before we do so, we must exclude altogether from our classification such communities as the Native States of India and the Indian tribes of North America. The former are sometimes spoken of as independent states; but in reality they are not even part-sovereign in the sense given to that term in International Law, for they may not make war or peace or enter into negotiations with any power except Great

Britain.<sup>1</sup> The latter have been adjudged by the United States Supreme Court in the case of the Cherokee Nation *v.* the State of Georgia, not to be foreign states, but "domestic dependent nations."<sup>2</sup> They cannot deal in any way with any power other than the United States, and consequently International Law knows nothing of them. The same sentence of exclusion must be pronounced upon the tiny republic of San Marino in Italy. It enjoyed for centuries local self-government under the protection of the States of the Church, and in 1862 the King of Italy took the place they had previously occupied. But it has no foreign affairs, and is therefore for all international purposes part of the Italian kingdom.<sup>3</sup>

### § 50.

The relation of Suzerain and vassal is far less frequent now than it was before the French Revolution, when the states of the Holy Roman Empire were reckoned among political communities whose sovereignty was defective. They had, however, been practically independent since the Peace of Westphalia in 1648; and the dissolution of the Empire in 1806 was but the last step in a long series of events which had been gradually destroying the authority of the successors of Augustus and Charlemagne. At the present time the states under the control of a Suzerain are few in number. Most of them are to be found among the outlying provinces of the Turkish Empire. The oppressed Christian populations of these districts have from time to time risen against the authority of the Sultan; and it has been the policy of the Great Powers to develop in them the faculty of self-government by compelling the Porte to grant first local autonomy, then a greater or less measure of liberty in dealing with external affairs, and

Communities  
under a Suzerain.

<sup>1</sup> *Statesman's Year Book* for 1894, p. 118.

<sup>2</sup> Peters, *Reports of the United States Supreme Court*, V., 1.

<sup>3</sup> Twiss, *Law of Nations*, § 36.

finally complete independence. Thus the principalities of Moldavia and Wallachia possessed few privileges beyond that of having their governors or Hospodars elected by their own nobility, till the treaties of Kutschuk-Kainardji in 1774 and Adrianople in 1829 made them into Part-Sovereign States under the suzerainty of the Porte and the guarantee of Russia. The treaty of Paris of 1856 substituted a European for a Russian guarantee. In 1861 the persistence of the inhabitants was successful in extorting from the Porte the union of the two principalities into the one realm of Roumania; and in 1878 the independence of Roumania was recognized by the Great Powers and Turkey. Its ruler, Prince Charles of Hohenzollern, took the title of King in 1881. The case of Roumania may be regarded as fairly typical. What we have said of it would apply *mutatis mutandis* to Servia, and will in all probability apply in the course of time to the principality of Bulgaria, which was freed from the Turkish yoke with more or less completeness by the Treaty of Berlin in 1878. Montenegro stood on a somewhat different footing. Its Prince claimed never to have lost his independence, while the Sultan asserted the rights of a Suzerain over the country. The dispute, after being the cause of countless wars, was ended by the Treaty of Berlin, wherein the independence of Montenegro was recognized by all the signatory powers who had not recognized it before. It will be seen, therefore, that Roumania, Servia, and Montenegro are now completely Sovereign States, and accordingly they belong to the first of the classes into which we have divided the Subjects of International Law. Bulgaria, however, must be regarded as a Part-Sovereign State under the suzerainty of the Porte. It is governed as an autonomous principality by a Prince in whose line the dignity has been made hereditary. In 1886 the province of Eastern Roumelia was united to it by the force of a popular movement. The Great Powers have made no attempt to undo the work of this successful revolution, though they

have not accorded a formal recognition to the union. They have treated in the same way the election of Ferdinand of Coburg as Prince of Bulgaria in 1887, after the forced abdication of Prince Alexander. The Treaty of Berlin constituted Bulgaria "an autonomous and tributary Principality under the suzerainty of His Imperial Majesty, the Sultan." Ottoman troops were to be excluded entirely from its territory, which was to be defended by a national militia. The treaty was silent as to the right of negotiating with foreign powers, though it implied that such a right existed by the provision for the conclusion of a Railway Convention immediately after the termination of the war. In 1888, however, the representative of the principality was not allowed to sign a convention about the navigation of the Danube, the signature of the Porte being held to suffice.<sup>1</sup> But since then the rulers of Bulgaria have shown great activity in the management of foreign as well as domestic affairs. They have waged a successful war with Servia, and have constantly negotiated with foreign powers for the recognition of the changes they have effected in the internal arrangements of their country. It is clear that they already possess a large share of the external sovereignty over the principality; and probably they will before long obtain it all, and become absolutely independent. But at present we must rank the country among those Part-Sovereign States which are under a Suzerain.

The position of Egypt is peculiar and anomalous; but there can be no doubt that by the letter of international documents it has been constituted a Part-Sovereign State under the suzerainty of the Porte. It was for centuries a province of the Ottoman Empire; but in 1831 its ruler, Mehemet Ali, revolted against the Sultan. After some years of successful warfare he was on the point of taking Constan-

<sup>1</sup> For the territorial and other arrangements referred to in the text, see Holland, *European Concert in the Eastern Question*, Ch. VI., and Twiss, *Law of Nations*, Chs. IV. and V.

tinople, when the Great Powers interfered and compelled him to restore the larger part of his conquests. But by the Quadruple Treaty of 1840, and the Sultan's Firman of June, 1841, Egypt was erected into an hereditary Pashalic under the rule of Mehemet Ali and his descendants; and by these and subsequent concessions the title of Khedive was conferred upon the ruler of the country, and he obtained many of the rights of a sovereign prince. He could maintain an army, contract loans, and make non-political conventions with foreign powers; and though by the Firman of 1879 the number of Egyptian soldiers was limited to eighteen thousand, and a few other restrictions were imposed upon Tewfik Pasha, the new Khedive, he was left in possession of many of the powers of external sovereignty. The position of the Khedive is still nominally defined by Firman, but the state-paper suzerainty of the Porte has been practically set aside, owing to the power exercised over Egyptian affairs, first by England and France acting together, and then, after the withdrawal of France from active co-operation in 1882, by England acting alone. Since Great Britain put down in that year the revolt of Arabi Pasha, Egypt has been occupied by British troops, and the country has been governed under British advice and largely by British administrators.<sup>1</sup> The present state of affairs cannot be prolonged indefinitely. Great Britain is pledged to withdraw her troops as soon as the task of reorganizing the finances of Egypt and building up a solid and permanent native administration is completed. Whatever may be the arrangement finally arrived at, it is certain that the Great Powers of Europe will be consulted, and that the country will not be allowed to glide back under the corrupt despotism of the Ottoman Porte.<sup>2</sup>

Monaco may perhaps be added to Bulgaria and Egypt in order to complete the list of Part-Sovereign States under the

<sup>1</sup> Holland, *The European Concert in the Eastern Question*, Ch. IV.

<sup>2</sup> Debate in House of Commons, Aug. 10, 1882, *Hansard, 3d Series*, Vol. CCLXXIII.

authority of a Suzerain belonging to the European state-system. The superior power in this case is Italy, which has succeeded to the rights given to the King of Sardinia by the Treaty of Turin of 1817. The Prince of Monaco, though practically powerless, does appear to possess some of the rights of external sovereignty; for he occasionally negotiates a treaty, consuls are accredited to him, and the principality has its own commercial flag. The Republic of Andorra in the Pyrenees is another "international atom," devoid of power and consequence, but capable of presenting a curious problem to the international jurist. It negotiated a treaty with Spain as late as 1834, and we must therefore hold that it has the power of dealing directly with foreign states. But it is obvious that a community of ten thousand souls, hidden away in the valleys of the Pyrenees and transacting its own local affairs under the joint protection of the French Republic and the Spanish Bishop of Urgel, will rarely be troubled by foreign complications.<sup>1</sup> It is an antiquarian curiosity and a jural puzzle. If we must classify it, we had better place it in the first division of Part-Sovereign States. Its name concludes the list as far as Europe and the European state-system are concerned. A microscopic examination of the other quarters of the globe might perhaps reveal some civilized communities which stand to one another in the relation of Suzerain and vassal. But they are few and unimportant, and we need not strive to find them.

### § 51.

We now come to the second kind of Part-Sovereign States; that is, those which are members of the looser form of Confederation called a *Staatenbund*. The peculiarity of this sort of Union is that the central authority does not transact the whole external business of the Confederation, but each confederated state

Members of a  
system of con-  
federated states.

<sup>1</sup> Twiss, *Law of Nations*, §§ 27 and 35.

reserves to itself the right of dealing directly with foreign powers in matters not expressly removed from its cognizance by the provisions of the Federal Pact. For instance, in the German Confederation which lasted from 1815 to 1866, each member had the right of entering into relations with foreign states provided that it did nothing against the security of any other member or of the Confederation itself. The central authority was vested in a Diet which sat at Frankfort, and was composed of the ministers of the separate states. It had the power of making treaties, sending and receiving ambassadors, and declaring war against foreign powers in case the territory of the Confederation should be threatened by them. But these powers were sparingly exercised. The Diet maintained no permanent legations at the courts of other states, and only the five Great Powers accredited ambassadors to it. On the other hand, the separate states sent representatives both to one another and to foreign states.<sup>1</sup> The full powers of sovereignty over each of the German states were thus, according to the letter of the Federal Bond, divided between the Diet and the home government of that state. The central authority at Frankfort, therefore, as well as the government of each of the separate states must in strictness be accounted part-sovereign. A difficulty may be felt with regard to the application of this term to such powerful states as Austria and Prussia. But nothing more is meant thereby than the assertion that their authority over their territory within the limits of the Confederation was limited, at least on paper, by the authority of Diet. With respect to their non-German possessions they were, of course, fully sovereign; and for all practical purposes they were sovereign in their German dominions also, since they either manipulated the Diet at their pleasure, or, if that was impossible, disregarded its decisions. But by the terms of the Federal Pact their authority was as much limited as was that of Saxony or Baden, and it is impossible to put

<sup>1</sup> Wheaton, *International Law*, §§ 47-51.



them in a different category, considered as members of the Confederation. Had the states which composed it been equal or nearly equal in power, the conclusion to which we have been led by a consideration of its Constitution would have been manifest upon the face of its history. And since the German Confederation is regarded as the type of a *Staatenbund*, we may give a general application to the deductions we have drawn from our study of it, and lay down with confidence that in all such unions both the central authority and the separate members are to be regarded as Part-Sovereign States. The power of each member is limited by the authority of the central body, and the power of the central body is limited by the rights reserved to each separate member. Inasmuch as both the central authority and the separate states carry on diplomatic intercourse with foreign powers, they must each and all be regarded as Subjects of International Law; and inasmuch as they carry on such intercourse only in a limited degree, they cannot be regarded as fully and absolutely sovereign. But nevertheless a clear line of demarcation separates them from Part-Sovereign States which are under a Suzerain. We cannot properly speak of suzerainty in connection with a *Staatenbund*. The central authority, being created by the separate states and dependent for its very existence upon their will, can hardly be considered as their superior, and it would be absurd to talk of it as being itself under the suzerainty of the members of the Confederation. It is necessary, therefore, to place Part-Sovereign States which are members of a Confederation in a sub-class by themselves. Such Confederations are from the nature of the case doomed to extinction; since they exist, politically speaking, in a condition of unstable equilibrium. Probably none of them have survived to the present day. Their members either separate and form fresh combinations, as did those of the German Bund, or they tighten the Federal Bond till their union becomes a *Bundesstaat*, as did those of the Swiss Confederation.

## § 52.

Part-Sovereign States of the third kind have usually been looked upon as fully independent. Yet if the description of sovereignty we have given be correct, it is hard to see how permanently neutralized states can be so regarded. Their integrity and independence are guaranteed by agreement between the Great Powers, on condition that they do not go to war except for the defence of their own territory when attacked, and do not in time of peace enter into any engagements which might lead them into hostilities for other than purely defensive purposes. Clearly this condition, on which alone they are suffered to have a national existence, is a limitation of the independence which is guaranteed to them. A fully sovereign state can make war for any purposes that seem to it sufficient, and under any circumstances that in the opinion of its rulers call for an appeal to force. To deprive it of that right is to restrict its external sovereignty; and when a political community is shorn of one of the attributes of independence, not temporarily and for a special purpose, but permanently and as a condition of its existence, it can hardly be ranked among fully Sovereign States. That it is called independent in the treaty of guarantee proves nothing. Diplomats have a habit of disguising unpalatable facts in language calculated to soothe wounded susceptibilities." One of the first lessons to be learnt by a student of statecraft is that words are often used, not because they do, but because they do not, represent the things referred to. We must deal with realities if we are to succeed in making a scientific classification of the Subjects of International Law. It is a fact that the rulers of permanently neutralized states do not exercise all the powers of sovereignty. The states in question are, therefore, part-sovereign, though the powers of which they are deprived are few and unimportant compared with the powers which they possess. They differ, however,

from other Part-Sovereign States in that the attributes of sovereignty which the domestic rulers lack are not vested in the government of any other community. In Part-Sovereign States of the first kind the Suzerain exercises the powers of which the local government is deprived. In loose Confederations the central authority transacts with foreign powers the business which the rulers of the separate states are not competent to transact for themselves. But when a state is permanently neutralized, no external authority can involve it in offensive war. The powers which its domestic rulers cannot exercise are not given to the rulers of some other state: they are suspended altogether by public law. As long as the state remains neutralized they do not exist. No one, for instance, can legally involve Belgium, Switzerland, or Luxemburg in war for any other purpose than the defence of their own frontiers. Their territories are neutralized; and therefore neither their own governments nor any others have by International Law the right to make offensive war on their behalf. Their position is in many respects peculiar. We have defined it here so far as is necessary for our present purpose. When we come to deal with Neutrality we shall have to refer to it again.<sup>1</sup>

### § 53.

We have now to consider the relation in which *Civilized Belligerent Communities not being States* stand to International Law. We have reckoned them among its subjects and it remains for us to justify our classification. These communities have not received recognition as Sovereign States; but their governments possess the essential attributes of sovereignty, and they desire admission into the family of nations. Why then are they excluded? Because the fact of their sovereignty may be a temporary phenomenon. They are endeavoring by war to cut themselves adrift from the state of which they form a

Civilized Belligerent Communities not being States.

<sup>1</sup> See §§ 245, 246.

part, and set up a separate national existence of their own; and while serious efforts are still being made for their subjection, the government they have created may at any moment be overturned, and they may relapse into their former condition of component portions of a larger political whole. Accordingly they are not recognized as independent states while the struggle is proceeding with any semblance of vigor on the part of the mother country. But meanwhile they are levying armies, equipping cruisers if the contest is maritime, and carrying on war in a regular and civilized fashion; and those states who are brought into contact with their operations must decide whether to regard them as lawful or unauthorized. In a case such as we have supposed there can be no doubt of the decision. War exists as a fact, and interested states must open their eyes to it. This they do by according to the incipient political community what is known as Recognition of Belligerency. The effect of their action is to endow the community with all the rights and all the obligations of an independent state so far as the war is concerned, but no further. Its armies are lawful belligerents, not banditti; its ships of war are lawful cruisers, not pirates; the supplies it takes from invaded territory are requisitions, not robbery; and at sea its captures made in accordance with maritime law are good prize, and its blockades must be respected by neutrals. But on the other hand, its government cannot negotiate treaties, nor may it accredit diplomatic ministers. The intercourse it carries on with other powers must be informal and unofficial. It has no rights, no immunities, no claims, beyond those immediately connected with its war. It is thus a Subject of International Law only in a limited and imperfect manner. The subjection is very real as far as it goes, but it covers but one portion of the activity of a state and does not extend in any way to the normal relations of peaceful intercourse. Should the belligerent community succeed in defeating all the attempts of the mother country to subdue it, sooner or later existing states

will accord to it Recognition of Independence, and it will then stand on the same footing as they do and become a Subject of International Law in all things. We shall see later on in this chapter what are the conditions of Recognition of Independence, and when we come to deal with the subject of War we shall discuss under what conditions Recognition of Belligerency may be given without affording to the parent state just ground of offence.<sup>1</sup>

### § 54.

*Corporations* come fourth in our list of the Subjects of International Law; and if we had none but ordinary corporations to deal with, a very few words would suffice to indicate the nature of their connection with it. As owners of property they may under certain circumstances come under its rules, especially in matters connected with belligerent capture. If a state in time of war makes a lawful seizure of enemy property on land or at sea, it matters not whether the private owner be an individual, or a group of individuals associated together in a company for trading or other purposes. In either case the property will be confiscated, and all right in it will be lost to the original possessors. The Prize Courts which administer the law of maritime capture frequently decide upon questions involving corporate ownership, and the rights of corporations may come before international tribunals or be the subject of diplomatic correspondence. Thus far the matter is simple; but we enter upon a sphere of great complexity when we endeavor to describe the international position of those great chartered companies which have been called into existence within the last few years by some of the colonizing powers, especially Great Britain and Germany, to open up enormous territories recently brought within the sphere of their influence. We refer to such privileged corporations as the

Corporations both ordinary and privileged.

<sup>1</sup> See §§ 162-163.

German East Africa Company, the British East Africa Company, the Royal Borneo Company, the Royal Niger Company, and the British South Africa Company. The last is probably the strongest and most important of them all. It may be considered typical of its class; and an examination of the powers conferred upon it will enable us to fix the position of the great chartered companies in International Law.

By Order in Council dated January 18, 1889, Queen Victoria granted to a group of noblemen and gentlemen a royal charter of incorporation as a British company formed for the purpose of carrying into effect concessions made by the chiefs and tribes of a region which stretches, as extended by further grant from Her Majesty in 1891, from the Transvaal Republic and the 22d parallel of south latitude to the southern limits of the Congo Free State and German East Africa, and is bounded on the east and west by Portuguese and German spheres of influence and the Nyassaland Protectorate of Great Britain. Within this enormous territory the company possesses by royal grant the liberty to acquire by concession from the natives "any rights, interests, authorities, jurisdictions, and powers of any kind or nature whatever, including powers necessary for the purposes of government." This right is to be exercised subject to the approval of the Secretary of State for the Colonies, whose consent has to be gained to the legislative ordinances the company may promulgate, and whose arbitration may be offered, and must be accepted if offered, in case any differences arise with any native chief or tribe within the territory. The company may establish a police force and use a distinctive flag indicating its British character. It is bound not to set up any monopoly of trade, nor to allow the sale of intoxicants to the natives, nor to interfere with their religious rites except for purposes of humanity. It must establish courts for the administration of justice and pay due regard therein to native laws and tribal customs. The discourage-

ment and gradual abolition of the slave-trade and domestic servitude are made obligatory upon it. The suggestions of the Colonial Secretary are to be adopted if he dissents from "any of the dealings of the company with any foreign power," and proper attention is to be paid to the requirements and requests of the British High Commissioner in South Africa and other officers of the Queen who may be stationed in its territories. Further, it is bound to perform, under the direction of the Colonial Secretary, all obligations contracted by the Imperial Government with foreign powers in so far as they relate to its territory and its activities. And lastly, the Crown reserves a right to revoke its charter at any time, if it exercises its powers improperly, and to alter or put an end to so much of the charter as relates to administrative and public matters after twenty-five years from the first grant, and at the end of every succeeding period of ten years.<sup>1</sup>

It is easy to see how the natives must regard a body of men armed with such authority as that granted to the British South Africa Company, and possessed of skill, energy, scientific machinery, and weapons of precision. To them the company must be all-powerful. They know little or nothing of the Imperial Government, and indeed the control exercised by the Colonial Secretary, though it looks imposing on paper, must from the nature of the case be merely nominal except in very great emergencies. He is thousands of miles from the scene of action: his information is what the company gives him, and he is busied with a multiplicity of other and more pressing matters. Practically the company rules its territories in so far as they are ruled at all. It legislates, it administers, it punishes, it negotiates, it makes war, and it concludes peace. As regards the native tribes, it exercises all the powers of sovereignty. And what is true in fact is true in theory also. Powers of internal government are expressly

<sup>1</sup> *London Gazette*, Dec. 20, 1889; *Statesman's Year Book for 1894*, pp. 193-195.

given by the charter, and some kind of authority to settle external affairs is implied in the provision that the Colonial Secretary may dissent from the dealings of the company with foreign powers. Yet all this vast fabric of supremacy rests upon the foundation of a royal grant which is subject to be revoked at any time if the advisers of the British Crown are dissatisfied with the conduct of the company, and is exercised from day to day at the discretion of a royal officer who has power to disallow the company's acts and insist upon obedience to his requirements. And behind all stands the reserved supremacy of the Imperial Parliament, which could by legislation make any alteration it pleased in the constitution and position of the company, or even abolish it altogether. Clearly then it is no independent authority in the eye of British law, but a subordinate body controlled by the appropriate departments of the supreme government. Like Janus of old, it has two faces. On that which looks towards the native tribes all the lineaments and attributes of sovereignty are majestically outlined. On that which is turned towards the United Kingdom is written subordination and submission. We may extend the simile and make it apply to all the other chartered companies of which we spoke. They are sovereign in relation to the barbarous or semi-barbarous inhabitants of the districts in which they bear sway. They are subject as regards the governments of their own states. History comes on this point to the aid of abstract reasoning, and by showing how England's great East India Company ruled a mighty empire, and yet was subject from time to time to British legislation and was at last swept away altogether by the action of Queen and Parliament, confirms in a striking manner the view we have ventured to take of the position in International Law of its imitators and successors. They are altogether abnormal; and in all probability many complications are destined in future to arise from the peculiar conditions of their existence.<sup>1</sup>

<sup>1</sup> See § 104.



## § 55.

We have now reached the fifth and last class of subjects of International Law. *Individuals* may come under its rules as owners of property or because of acts <sup>Individuals.</sup> done by them in time of war as private persons and not as agents of the state, or on account of circumstances in their lives which bring them into direct relations with some authority whose force is derived from the law of nations and not from Municipal Law. We exclude from our classification the authorized agents of the belligerents. Their acts are state acts, for which their country is responsible; and any controversies that may arise about them are controversies between two nations. But the rules of belligerent capture are applied to private individuals, and Prize Courts discuss and settle the changes in proprietary right made in consequence of hostile seizure at sea. Private persons may, while war is going on, perform on their own responsibility acts which will bring them into direct contact with rules of International Law. They may, for instance, attempt to run a blockade, and suffer forfeiture of ship and cargo; or they may fire upon the enemy from the windows of their houses, and be executed as unauthorized combatants. Again, in time of peace a man may become a pirate, and thus render himself liable to be hanged after trial and condemnation by a duly constituted court of any country whose cruisers can seize him. It acts because International Law gives to every state the right to capture pirates, even though they are not its own subjects. These cases are exceptional. As a rule, the law of nations takes no cognizance of individuals as such. States, being but aggregations of human beings, must carry on their mutual intercourse by human agency: but it is the state, and not its agents, that comes under the law. Sometimes, however, one state is empowered to deal directly with citizens of another in their individual capacity; and when this occurs they are, for the time and as far as the question extends, subjects of International Law.

## § 56.

A large number of the states which belong to what is aptly called the family of nations, and acknowledge certain rules as binding in their mutual intercourse, have been in this position from time immemorial. Modern International Law grew up among them. There never was a time when they were outside its pale. Their influence helped to mould it. Many of them existed before the great majority of its rules came into being. There was no need for them to be formally received among its subjects. Anything like a ceremony of initiation would have been wholly inapplicable to their case. The older states of Europe are in this condition. They form as it were the nucleus of international society. But with regard to other states there was a necessity for formal admission into it, either because a new body politic was formed where no separate international entity existed before, or because a political society already in existence so altered its character as to be capable of abiding by rules which had previously been inapplicable to it.

Admission of new subjects of International Law.

## § 57.

We shall find on examination that the admission of new subjects within the pale of International Law takes place under three different sets of circumstances. The first occurs when a state hitherto accounted barbarous is received into the family of nations, as was Turkey by the Treaty of Paris of 1856, the seventh article of which declared "the Sublime Porte admitted to participate in the advantages of the public law and system of Europe."<sup>1</sup> With more or less of formality, Persia, China, and Japan have been accorded a similar recognition. As we have already seen, the possession of a fixed territory and a certain size and importance are essential to member-

States hitherto accounted barbarous.

<sup>1</sup> Holland, *European Concert in the Eastern Question*, p. 245.

ship in the family of nations. A further requisite is that the state to be admitted shall be to some extent civilized after the European model; but the exact amount of civilization required cannot be defined beforehand. Each case must be judged on its own merits by the powers who deal with it; and it is clear that they would not admit a state into their society if they did not deem it sufficiently like to themselves in organization and ideas to be able to observe the rules they have laid down for their mutual intercourse.

### § 58.

Another case of admission is exemplified when a new body politic formed by civilized men in districts hitherto left to nature or to savage tribes is recognized as an independent state. The Transvaal, or South African Republic, affords an excellent example.

States formed by  
civilized men in  
hitherto uncivil-  
ized countries.

In 1835 a number of Dutch farmers left Cape Colony and went out into the wilds of South Africa. They settled first in the district now known as the Colony of Natal, where they set up a rudimentary form of civilized government. On the annexation of this territory to the British Empire they again migrated, and, having crossed the river Vaal, established themselves in the country beyond it with the town of Pretoria as their capital. In 1852 they were recognized by Great Britain as an independent state, and other powers followed her example. Subsequent events have deprived the republic of some portion of its external sovereignty; but it is still a separate political entity, and plays an important part in that rapid development of South Africa which is going on before our eyes. Another example of the class of cases under consideration is to be found in the creation and recognition of the Congo Free State, which was founded by the International Association of the Congo, a philanthropic society under the direction of the King of the Belgians, who for some years provided from his private re-

sources the funds necessary to carry on its operations. These were directed towards the formation of civilized settlements in the vast area of the Congo basin, for the purpose of combating the slave-trade and opening up the country to legitimate and peaceful commerce. Treaties were made between the Association and numerous native tribes, whereby it acquired an enormous territory, estimated to consist of 900,000 square miles with a population of 17,000,000 souls. Its boundaries received clear definition in a series of conventions and declarations negotiated in 1884 and 1885 between the Association and the various states represented at the West African Conference of Berlin. They recognized it as an independent state and acknowledged its flag as that of a friendly power. By the Final Act of the Conference its territory was included in the zone within which all nations were to enjoy complete freedom of trade, and the signatory powers bound themselves to respect its neutrality in the event of a war as long as it fulfils the duties which neutrality requires. The new state thus created possessed few sources of revenue; and had it not been for the large sums expended by the King of the Belgians, its sovereign, upon the work of its development, it would not have been able to maintain its stations and go forward with its task of opening up the country. The burden was partially lifted from his shoulders in 1890, when the parties to the Final Act of the West African Conference empowered the Congo Free State to levy certain moderate duties on imports for revenue purposes. Belgium also gave it financial assistance, receiving in return a right of annexation after a period of ten years. The King had previously bequeathed by will to the Belgian state his rights as sovereign of the Congo Free State, and though its future is doubtful, within a few years it may become, subject to its existing international obligations, a dependency of Belgium.<sup>1</sup> A third instance of the

<sup>1</sup> British State Papers, *Africa*, No. 4 (1885); *Statesman's Year Book for 1894*, pp. 439-440.

grant of recognition to communities of men who established civilized rule in uncivilized districts is to be found in the history of the Republic of Liberia, originally founded, like the Congo Free State, by a voluntary association of individuals leagued together for philanthropic purposes. In this case the association was The American Colonization Society for the Establishment of free men of color of the United States. In 1821 it obtained from the native chiefs the cession of a tract of territory on the coast of Upper Guinea, and sent thither a number of emancipated negroes. Liberally assisted with funds by the American Association, this community grew into an organized state which in a few years declared itself independent, and in 1847 assumed the title of the Republic of Liberia. Great Britain was the first power to recognize the new state, which she did by negotiating a formal treaty with it in 1848. Since that time other countries have followed her example, and the negro Republic is an undoubted member of the family of nations.<sup>1</sup>

### § 59.

The last and most frequent case of admission into the society formed by civilized states occurs when a political community which has cut itself adrift from the body politic to which it formerly belonged and started a separate national existence of its own receives Recognition of Independence from other states. The community thus recognized must, of course, possess a fixed territory, within which an organized government rules in civilized fashion, commanding the obedience of its citizens and speaking with authority on their behalf in its dealings with other states. The act of Recognition is a normal act, quite compatible with the maintenance of peaceful intercourse with the mother country, if it is not performed till the contest is either actually or virtually over in favor of

States whose Independence is recognized in consequence of a successful revolt.

<sup>1</sup> Twiss, *Law of Nations*, Preface to 2d ed.

the new community. Thus the Recognition of the Independence of the United States by those powers who accorded it after Great Britain had herself recognized them as independent by the Preliminaries of 1782 was no unfriendly act towards her; but their Recognition by France in 1778, when the contest was at its height and the event exceedingly doubtful, was an act of intervention which the parent state had a right to resent, as she did, by war. Again, when the Independence of the revolted Spanish-American colonies was recognized by Great Britain, Spain had no cause to complain of any breach of international right, because no Recognition was accorded in any case till she had ceased from serious efforts to restore her supremacy, though on paper she still asserted her claims. Recognition was given first to Buenos Ayres in 1824, and at that time the contest had lasted for twenty years and the colony had been free from Spanish rule for fourteen years. The case of Texas and its Recognition by the United States is somewhat similar. In 1836 the revolted Texans not only defeated the Mexican army at San Jacinto, but took the Mexican President prisoner. The further attempts of Mexico to regain her authority were absolutely impotent, and the contest was over when the United States recognized the Texan Republic in 1837.<sup>1</sup>

### § 60.

Recognition may take place in various ways. Sometimes a formal declaration of Recognition is made in a separate and independent document, and it was in this way that the United States recognized the Congo Free State in 1884.<sup>2</sup> Sometimes such a declaration is embodied in a treaty which deals with other matters also, as was done when Germany recognized the same state

The various methods of Recognition of Independence.

<sup>1</sup> Historicus, *Three Letters on Recognition*; Wharton, *International Law of the United States*, § 70.

<sup>2</sup> British State Papers, *Africa*, No. 4 (1885), pp. 262-263.

in the same year.<sup>1</sup> Occasionally the Recognition is made conditional, as when the Independence of Roumania, Servia, and Montenegro was recognized in the Treaty of Berlin of 1878, on the condition that they imposed no religious disabilities on any of their subjects.<sup>2</sup> Recognition may be effected, without the use of words directly according it, by entering into such relations with the recognized community as are held to subsist between independent states alone. Thus there is no formal statement of Recognition in the Treaty of Amity and Commerce between France and the United States in 1778; but the independence of the revolted colonies is taken for granted in every article, and they covenant again and again to do what can only be done by Sovereign States.<sup>3</sup> The sending of a duly accredited diplomatic representative, as was done by the United States in the case of Texas, has the same effect as the negotiation of a treaty. Both are acts of sovereignty, and to perform them towards an aspirant for admission into the family of nations implies that, as far as the state which does them is concerned, its desire is granted. Recognition by one state in no way binds others. But the example, once set, must soon be followed, unless the newly recognized community loses almost immediately its *de facto* independence, or is so small and unimportant as to be neglected with impunity. The quickness or slowness of Recognition is often determined by political sympathies; but no power can continue for an indefinite time to shut its eyes to accomplished facts. When a province or colony has won a real Independence, recognition of it must come sooner or later, even from the parent state. The lead in these matters is usually taken by the government of some influential country. Sometimes the Great Powers of Europe acting together in concert agree upon a Recognition, as when they admitted Turkey to participate in the advantages of

<sup>1</sup> British State Papers, *Africa*, No. 4 (1885), pp. 263-264.

<sup>2</sup> Holland, *European Concert in the Eastern Question*, pp. 293-303.

<sup>3</sup> *Treaties of the United States*, pp. 296-305.

public law, or gratified the national aspirations of the Balkan States on condition of abstinence from anything that savored of religious persecution. In cases such as these the smaller states almost invariably follow the example of their more powerful neighbors. Indeed, the Concert of Europe, which means the agreement of the six Great Powers, may be said to represent the whole of Europe and speak on its behalf.



## CHAPTER V.

### THE SOURCES AND DIVISIONS OF INTERNATIONAL LAW.

#### § 61.

By the sources of International Law we mean the places where its rules are first found.<sup>1</sup> An inquiry into them is therefore historical in its nature. It has nothing to do with the reason why the rules were originally invented or accepted. Whether those who first set them forth or obeyed them did so because of their conformity with a supposed Law of Nature or because of their obvious utility, whether they were actuated by motives of benevolence or by motives of self-interest, are questions foreign to the present inquiry. Doubtless considerations of very various degrees of respectability have presided over the making of the complex mass of rules we call International Law. But our object here is to trace the process of formation, not to enter into the mental and moral predilections of those who took part in it. We must also remember that no rule can have authority as law unless it has been generally accepted by civilized states. Its source does not give it validity. Custom is, as it were, the filter-bed through which all that comes from the fountains must pass before it reaches the main stream. We have to take the rules we find in operation to-day and trace them back to the places where they have their origin. In doing so we shall find that the sources of International Law may be resolved into five, which we will proceed to describe in the order of their importance.

Meaning of the phrase, The sources of International Law.

<sup>1</sup> Austin, *Jurisprudence*, II., 526-528.

## § 62.

First in influence and authority among the sources of our Science must be reckoned

*The works of great publicists.*

From the time of Gentilis and Grotius down to the present day there has been a long series of able writers, whose works have influenced the practice of states and whose published opinions are appealed to in international controversies. They occupy a position analogous to that of the great institutional writers on Common Law. That is to say, their views are quoted and treated with respect in disputed cases, but are not necessarily decisive. In international controversies the longer the chain of authorities in support of any particular contention, the nearer the approach to unanimity in the opinions of jurists of recognized position, the more likely it is that their judgment will prevail. Where there are two opposing schools of thought, a quotation from one author of repute can always be capped by another expressed in a contrary sense. But a nation which should disregard a general *consensus* of opinion, in which its own publicists joined, would be held to be acting in a high-handed and aggressive manner. The value of the works of the great international jurists is by no means confined to the settlement of points that are so far doubtful as to afford matter for controversy. Many rules of undoubted validity were first introduced into the law of nations by them. We have but to take up one of the chapters in which Grotius pleads on behalf of his *temperamenta belli* in order to find stated there, for the first time as regards their international application, a number of humane precepts which have since become the commonplaces of belligerent theory and practice.<sup>1</sup> It is almost impossible to estimate how much of the present law of Occu-

<sup>1</sup> *De Jure Belli ac Pacis*, III., XI.-XVI.

pation and Jurisdiction is derived from principles introduced into our science by the Spanish casuists and Protestant civilians who first applied the rules of Roman Law to the international problems raised by the discovery of the New World. The extent of a state's territorial waters to-day is largely decided by views to which Bynkershoek gave currency early in the eighteenth century ;<sup>1</sup> and the work of Vattel two generations later supplied rule after rule for the rapidly growing law of neutrality.<sup>2</sup> With him the great formative influence of the publicists ceased. International Law had by no means taken its final shape. Indeed, there can be no finality about it while the complex society of nations is a living and growing reality. But the moulding influences passed into other hands. For two centuries the development of the law of nations had been the work of great thinkers and writers. It now became the task of statesmen and jurists. It was not that the publicist had ceased to be useful. On the contrary, the need for him was at least as great as ever. But whereas his function had been formative in the past, he was for the future to systematize and arrange, to reduce to principle and render consistent with themselves the rules evolved from controversies between states or laid down in the practice of law courts. And general consent testifies that the work has been well done. A long array of great names adorns the annals of international jurisprudence, and among them the publicists of Great Britain and the United States find an honored place. A race which has produced Kent and Wheaton and Manning and Phillimore, not to mention a host of others many of whom are still alive, has done no ignoble service in the cause of peace and justice. Since the middle of the eighteenth century great additions have been made to the rules which govern the intercourse of states ; and though a very small portion of them have come from the writings of jurists, their services in sifting and arranging the new matter have been invaluable. They have produced order from chaos, and made

<sup>1</sup> *De Dominio Maris* (1702).

<sup>2</sup> *Droit des Gens*, Bk. III., §§ 103-136.

International Law into a science, instead of a shapeless mass of undigested and sometimes inconsistent rules. And in most cases their impartiality has been as remarkable as their industry in collecting facts and their power of classification in co-ordinating them. National bias has not been altogether absent; but it has been kept under severe control, and the organization of the *Institut de Droit International*, with its frequent publications and annual meetings of the leading publicists of all civilized countries, has helped enormously to eliminate passion and prejudice from the discussion of the problems of state intercourse. There should be something of the judge and something of the philosopher in every writer on International Law. In many the qualities of both are happily combined, and there are very few who degrade themselves to the level of the heated partisan. Doubtful and difficult points are discussed in a scientific spirit as jural problems, and without any reference to their bearing on the interests of particular states. Indeed, it often happens that publicists consider questions as to which no international controversy has arisen. The opinions expressed are then of necessity unwarped by national pride or patriotic sentiment; and if states should hereafter differ with regard to the matters in question, the views set forth before the dispute arise will have the merit of absolute impartiality.

### § 63.

Next among the sources of International Law we place

#### *Treaties.*

There is a wide difference of opinion with regard to their value as exponents of the rules of our science. On one side, we find the view that they are merely agreements between states for the settlement of current difficulties, and possess little or no importance in the domain of international jurisprudence. On the other hand,

*Treaties.*

we see them, or rather a selected number of them, regarded as a sort of sacrosanct repository in which the most fundamental principles and binding rules of the law of nations are to be found. The writers of Great Britain and the United States incline to the former view. The latter is usually taken by the publicists of the European continent, though few of them would be prepared to state it in the extreme form it takes in the works of Hautefeuille.<sup>1</sup> In order to arrive at just conclusions, it will be necessary for us to follow the example of Hall<sup>2</sup> and distinguish between different kinds of treaties, though our classification will not be exactly the same as his.

We will consider first those which avowedly lay down new rules of international intercourse or change the international *status* of territories, and are assented to by all or nearly all civilized states. They are important in proportion to the number of their signatories and the length of time during which their provisions are observed. If the assent of all civilized states is given to them, either by signature at the beginning or by adhesion afterwards, they are legislative acts and have binding power over all the members of the family of nations. Such treaties are very rare, but it is hardly possible to exaggerate their importance as sources of International Law. The Geneva Convention of 1864 may be cited as an example. It neutralized all persons and things connected with the care of the sick and wounded in war; and since the adhesion of the United States, who held aloof till 1882, it may be regarded as of universal obligation. The Final Act of the Brussels Conference of 1890 for the suppression of the African Slave Trade is another case in point;<sup>3</sup> and it may be possible to regard the Final Act of the West African Conference of 1885 in the same light. It was signed, not indeed by all civilized powers, but by all the powers concerned or likely to be concerned in the development of

<sup>1</sup> *Droits des Nations Neutres, Discours Préliminaire.*

<sup>2</sup> *International Law*, pp. 9-13.

<sup>3</sup> See § 124.

Africa, including the United States.<sup>1</sup> In recognizing the establishment of the Congo Free State, providing means for the neutralization of certain districts in future wars, and making regulations as to freedom of trade and acquisitions of territory in Africa, it did a great work for humanity. The question whether it can be regarded as a legislative act, and therefore a direct and immediate source of International Law, raises a difficult problem. Strictly speaking, no state can be bound by a new rule without its own consent, and therefore the signature of every member of the family of nations is requisite in order to give universal validity to fresh arrangements. But in practice we find small and unimportant states tacitly accepting the arrangements made by great and influential powers, especially in matters which do not directly concern their own interests. It would be pedantry to assert that the assent of Switzerland, which possesses neither a ship nor a port, is absolutely necessary to give binding force to an agreement for altering the rules of maritime law, or that no improvement in the law of warfare on land could be considered universally valid if it lacked the signature of Liberia, which has no standing army. These are extreme cases, and on the principle of *de minimis non curat lex* we may perhaps ignore them. But the situation caused by the refusal of the United States to sign the Declaration of Paris of 1856 cannot be so easily passed over.<sup>2</sup> The American mercantile marine and the American navy are not matters that can be neglected in international affairs; and the ships of Spain, Mexico, Venezuela, and China, the other maritime powers, who have withheld their assent, would together amount to a fleet of considerable importance. It may be argued that the length of time that has elapsed since the drawing up of the Declaration, coupled with the fact that it has been observed in all subsequent wars, causes its rules to rest upon the general practice of states as well as upon their express consent. But while few will venture to dispute the truth of the proposition

<sup>1</sup> British State Papers, *Africa*, No. 4 (1885), pp. 304-313.    <sup>2</sup> See §§ 216, 223.

that long and uninterrupted custom in favor of a rule makes it a part of the Common Law of nations, there is room for great divergence of opinion as to how long the custom must last in order to override previous custom to the contrary. The Declaration of Paris has received the formal adhesion of nearly all civilized powers; and therefore practice based upon it must be held to become law sooner than if it had to win its way without a great international agreement behind it. But whether the time that has elapsed since 1856 is long enough to give the consecration of usage to the rules adopted in the Declaration is a question on which no approach to unanimity can be expected. The best hope for the future is that it may cease to be a question at all, owing to the adoption of the Declaration by those powers which have hitherto declined to sign it, or the universal acceptance of some further modification of belligerent rights at sea.

If treaties which really legislate are few, treaties which really declare the law are fewer. The conventions which embodied the principles of the Armed Neutralities of 1780 and 1800 purported to be declaratory;<sup>1</sup> but in reality the major part of the rules stipulated for in them were well known to be inconsistent with established practice, and were introduced for the purpose of curtailing the belligerent rights of Great Britain. The "Three Rules" of the Treaty of Washington of 1871 were agreed upon between the contracting powers "as rules to be taken as applicable to the case" of the *Alabama* and her sister cruisers, and the arbitrators appointed under the treaty were instructed to be guided in their decision by them and the "principles of International Law not inconsistent therewith."<sup>2</sup> The United States held that these rules were in force when the acts and omissions complained of took place, while the British Government placed on record a statement that it was unable to agree with this view, though for the sake of an amicable settlement it

<sup>1</sup> C. de Martens, *Recueil*, I., 193-194; II., 215-219.

<sup>2</sup> *Treaties of the United States*, p 481.

consented to be judged by the rules as if they had been part of International Law when the alleged offences were committed. Here then we have a case where one party to a treaty regarded an article in it as declaratory, while the other party held that it enunciated new rules. It is sometimes said that the Black Sea Conference of 1871 was declaring International Law when it enunciated the principle that no power can free itself from treaty engagements except with the consent of the other contracting powers.<sup>1</sup> Declaratory this proposition undoubtedly is; but it is not declaratory of International Law. Whether we argue from general principles or derive our rule from the practice of states, it is certain that there is no place in the law of nations for the doctrine of the perpetuity of treaty obligations unless all the powers which created them agree to let them drop. The subject is difficult in any case; but its difficulties are enhanced when high-sounding principles with a strong ring of "natural equity" about them are imported into the discussion without due consideration of their far-reaching consequences.<sup>2</sup> Should a treaty really declaratory, and declaratory of true law, be found to exist, it would undoubtedly be a source of International Law; for it would set forth for the first time in a clear and unmistakable manner a rule of universal application.

The next class of treaties we have to consider are those which stipulate avowedly for a new rule or rules as between the contracting parties. They are signed by two or three states only, and are meant to establish in their mutual intercourse some principle of action not in general use. Thus they are evidence of what International Law is not, rather than of what it is; for if the rules they lay down had been embodied in it, there would have been no need of special stipulations in order to obtain the benefit of them. The Treaty of 1785 between the United States and Prussia, contains an agreement of the kind under consideration. By the

<sup>1</sup> British State Papers, *Protocols of London Conference*, 1871, p. 7.

<sup>2</sup> See § 154.



thirteenth article the contracting powers declared that in case one was at war while the other was at peace, the belligerent would not confiscate contraband goods carried by a vessel of the neutral, but would be content to detain them instead.<sup>1</sup> The Common Law of nations gives the right of confiscation, as the negotiators on both sides well knew. And because they knew it, they entered into stipulations to override the ordinary rule and substitute for it one which they preferred. It is clear that treaties of this kind are not sources of International Law. Only in one case can they become so, and that is when the new rule first introduced by one of them works so well in practice that other states adopt it. If they take it up one by one till all observe it, the first treaty in which it appears is its Source, though a long interval of time may separate its original appearance from its final triumph. An instance of this is to be found in the history of the famous rule, Free ships, free goods. The first treaty between Christian powers which contains it was negotiated between Spain and the Netherlands in 1650;<sup>2</sup> and is therefore its source, though the rule has been obliged to wait till our own day before it has received such general acceptance as to make it part and parcel of the public law of the civilized world.

The last and most numerous class of treaties are those which contain no rules of international conduct, but simply settle the matters in dispute between the parties to them. The great majority of diplomatic instruments belong to this class, for as a rule when states come to negotiate they are far more intent upon getting rid of present difficulties than laying down rules and doctrines for the future. Compromise is the order of the day, and what is expedient at the moment is adopted without much thought of its relation to general principles. It is obvious that treaties negotiated in this spirit do not affect International Law at all, and are not intended to do so.

<sup>1</sup> *Treaties of the United States*, p. 903.

<sup>2</sup> Dumont, *Corps Diplomatique*, Vol. VI., Pt. I., p. 571.

When we speak of treaties we must be understood to mean separate articles as well as entire documents. Most international instruments contain stipulations on more matters than one, and important treaties generally deal with a great variety of subjects. One of them may, therefore, afford examples of several of the classes given above. In going through them we have seen that both the extreme views of the British School and the extreme views of the Continental School fail to set forth certain aspects of the truth. Some treaties, but very few, are from the beginning Sources of Law. Some treaties, but very few, become after a greater or less time Sources of Law. But the vast majority of treaties are valueless as evidence of what the law is, though they may be of the highest importance as creating new political arrangements or removing old subjects of contention.

#### § 64.

We now pass on to deal with

#### *The decisions of Prize Courts, International Conferences, and Arbitral Tribunals*

considered as sources of International Law. Prize Courts are tribunals set up by belligerent states for the purpose of deciding upon the validity of the captures made by their cruisers. They are supposed to administer International Law, and they do so unless the properly constituted authorities of their own states order them to carry into effect instead rules inconsistent therewith. Such interferences are fortunately rare; and accordingly it happens that the decisions of Prize Courts are respected in proportion to the reputation for learning, ability, and impartiality enjoyed by their judges. Those who preside over these courts have to remember that International Law has no locality, and must strive to divest themselves of all prepossessions in favor of their own country. As one of

Decisions of Prize  
Courts, Interna-  
tional Conferences,  
and Arbitral Tri-  
bunals.

the most distinguished of them said, when trying a case in which the claims of Great Britain as a belligerent came into sharp conflict with the claims of Sweden as a neutral, "It is the duty of the person who sits here to determine this question exactly as he would determine the same question if sitting at Stockholm; to assert no pretensions on the part of Great Britain which he would not allow to Sweden in the same circumstances; and to impose no duties on Sweden, as a neutral country, which he would not admit to belong to Great Britain in the same character."<sup>1</sup> This high standard has not always been reached; but some of the great ornaments of the bench have attained to it, and by their legal acumen, joined with their undoubted impartiality, have enriched the literature of International Law with a series of profound judgments which are quoted with respect wherever competent scholars discuss the rights and duties of civilized states. The names of Story the American, Stowell the Englishman, and Portalis the Frenchman, will live as long as the law of nations endures. Most of the cases which come before Prize Courts require nothing more for their solution than the application of well-known and universally accepted rules; but occasionally a new point arises, and then the decision of a great judge may become a source of International Law. At the moment he does no more than determine the case before him; but the justice and reasonableness of the rules he lays down may lead to their acceptance by other courts and in other countries, and thus in time they become incorporated into International Law. When a highly trained intellect, after hearing and reading carefully sifted evidence and listening to the arguments of able counsel, applies recognized principles to new circumstances, the result is not unlikely to be a rule of practice which stands the test of time and proves to be of universal application. It was thus that the doctrine of continuous voyages was introduced into

<sup>1</sup> Lord Stowell's Judgment in the case of the *Maria*; see Robinson, *Admiralty Reports*, I., 340.

International Law. Lord Stowell first invented it to meet the case of neutral vessels which, in the war between Great Britain and Revolutionary and Imperialist France, had endeavored to evade a prohibition to engage in the enemy's carrying trade by interposing a neutral port between their point of departure and the forbidden destination. Whatever may be thought of the original attempt to curtail the area of neutral trade, there can be no doubt that the doctrine of Lord Stowell was sound, and that it could be applied with perfect propriety to cases of blockade and contraband, where the right of the belligerent to interfere is clear and unmistakable. Accordingly, the rule was so applied, and general acceptance has made it a part of the law of nations. American vessels were the chief sufferers from it at first; but the courts of America not only adopted it in the civil war with the Southern Confederacy, but gave it an extension which is looked upon, in some quarters, with suspicion and dread.<sup>1</sup> The activity of Prize Courts is expended for the most part upon questions of pure maritime law; and consequently that portion of the International Code has a clearness and precision unfortunately absent from some of its other titles. But International Conferences and Arbitral Tribunals deal with any matters that are referred to them, and their decisions may, therefore, embrace subjects wholly removed from the sea and the affairs connected with it. Thus the decision of Marshal MacMahon, given in 1875, as arbitrator in the dispute between Great Britain and Portugal with regard to Delagoa Bay, did much to clear up a difficult point in the law of Occupation,<sup>2</sup> and it is quite possible that the decisions of the West African Conference of 1884-1885, upon the notifications to be given to one another by the parties to it of any fresh acquisition of African territory by Occupation, may in time develop into a general rule of International Law.<sup>3</sup>

In estimating the relative value of the decisions of Prize Courts and other tribunals on the one hand, and the writings of

<sup>1</sup> See § 276.

<sup>2</sup> See § 93.

<sup>3</sup> See § 95.

the great publicists and the provisions of treaties on the other, we must remember that the British and American lawyer is brought up in reverence for the judgments given by great judges in cases that have actually occurred, whereas the lawyer of France or Germany looks to the Code of his country and to the Code only. In these and many other countries the decisions of courts do no more than settle the cases before them. No legal rules are deduced from the judgments rendered; and precedents count for little in argument. Accordingly, when a jurist turns his attention to international affairs he brings to their investigation a mental habit already formed. If he belongs to one of the countries of the Continent of Europe he will instinctively search for a Code, and will find some approach to one in the writings of publicists of repute and in collections of great treaties. But a British or American jurist as naturally and unconsciously commences to examine recorded cases, and finds in them the most authoritative statements of the rules he is searching for. Each attitude is correct within limits; but, if carried to excess, leads to erroneous conclusions. In the consideration we have given to authoritative books, treaties, and judicial or quasi-judicial decisions, we have endeavored to discover by careful analysis their value as sources of International Law; but it must always be borne in mind that no rule, wherever found, can be regarded as law till it has received the express or tacit consent of states and has been generally adopted in transactions between them.

### § 65.

Next among the sources of International Law come

#### *State Papers other than Treaties.*

Treaties are national acts of a specially deliberate and solemn kind, and are rightly placed in a class by themselves. But other state papers may be State papers other than treaties. important as sources of International Law. Questions at

issue between states are often discussed in them with conspicuous learning and ability, and occasionally an international controversy clears up a disputed legal point or advances the application of principles which have before received little more than an otiose assent. Thus the Silesian Loan Controversy between Great Britain and Prussia in the middle of the eighteenth century<sup>1</sup> placed beyond possibility of doubt the rule that a state cannot make reprisals upon money lent to it by private persons belonging to another country. And again, the stand taken by the United States Government first in 1793 in favor of a wide interpretation and strict enforcement of its own neutrality obligations,<sup>2</sup> and afterwards, a generation ago, against a somewhat loose interpretation of the duties of neutrality by Great Britain in the case of the *Alabama* and her sister cruisers,<sup>3</sup> has led to a great increase in the strictness with which the principle of absolute impartiality, conceded on paper, but till recently not very closely adhered to in practice, has been applied to the conduct of neutral states. The controversies attending the formation, progress, and dissolution of the two great leagues known as the Armed Neutralities of 1780 and 1800<sup>4</sup> did almost as much to clear up the question of neutral rights as the *Alabama* controversy and the action of Washington in his second administration did to clear up the question of neutral duties. Many state papers are, from a legal point of view, worthless; others have but a temporary and evanescent value. But now and again some master mind produces a document or series of documents which change the whole course of international relations and become sources of law. It must be remembered that a large proportion of the questions which arise between states are never heard of outside the walls of foreign offices. Either they are too simple to admit of doubt, or they are at once referred to the law officers of the governments con-

<sup>1</sup> See § 198.<sup>2</sup> See §§ 261-263.<sup>2</sup> See § 244.<sup>4</sup> Manning, *Law of Nations*, Bk. V., Ch. VI.

cerned, whose opinion, given officially but not published at the time, if ever, is taken as conclusive and acted upon immediately. In this way International Law is always undergoing a process, not indeed of formation, but of crystallization. Floating ideas harden into definite rules, or one of two opposite views receives almost imperceptibly the consecration of practice.

§ 66.

The last of the classes into which we divide the sources of International Law may be described as

*Instructions issued by States for the Guidance of their own Officers and Tribunals.*

We have not considered these documents under the previous head, because they are of a domestic character, and are not drawn up with a view to any controversy between states. But though they have no other object than the regulation of the conduct of the agents and servants of the government which issues them, they may have a far wider effect than was intended or expected by their authors. When drawn by skilled jurists, they sometimes decide knotty points in a manner which proves so valuable in practice that other states adopt it. The French Marine Ordinance of 1681 dealt with the then nebulous and uncertain subject of Prize Law in a masterly manner. It was commented on by Valin in 1760, and from it Lord Stowell borrowed freely in his judgments on maritime cases. Thus what was originally intended as a guide to French cruisers and French tribunals became in time, and as to some of its provisions, a source of International Law. The Instructions for the Guidance of the Armies of the United States in the Field bid fair to attain a similar position in respect of warfare on land. Already they have been referred to and quoted with great

Instructions issued by States for the Guidance of their own Officers and Tribunals.

respect in many treatises,<sup>1</sup> and several states have issued corresponding manuals, all of which concur in making the laws of warfare on land more humane than they have been even in recent practice.

We have now been through the various sources of International Law. We see that any national act whereby a state signifies its assent to a given rule may become a source of law, provided that the rule in question is a new one. If it wins general assent it becomes a part of International Law. If it fails to be adopted in practice, it is but a pious opinion, however excellent it may be in itself. But universal obedience is not meant when we speak of general assent. Many rules of International Law have been violated on one pretext or another by states which fully acknowledge their validity. No law can expect to be always obeyed, least of all a law which has no power at its back to compel submission and punish disobedience. But though International Law is in this predicament, it is also true that flagrant and stubborn disregard of its well-established precepts is very rare, and that states on the whole show a praiseworthy willingness to govern their conduct towards each other by rules to which they have given an express or tacit consent.

### § 67.

From the sources of International Law we pass to its divisions. There is no subject on which the publicists of the seventeenth and eighteenth centuries are more at variance with each other than this. Grotius, as we have seen,<sup>2</sup> distinguished between a Natural and a Voluntary Law of Nations. His successors discussed at length the relations of Natural Law to International Law, and their distinctions and conditions multiplied as each one commented upon the opinions of his predeces-

Divisions of International Law.  
The old attempts at division useless.

<sup>1</sup> *E.g.*, Maine, *International Law*, p. 24.

<sup>2</sup> See § 33.



sors. The climax of complication was reached when Christian von Wolf, a Professor at Halle, in the preface of his *Jus Gentium*, published in 1749, divided the law of nations into Natural or Necessary Law, Voluntary Law, Conventional Law, and Customary Law; and, as if these were not enough, referred incidentally to an Internal and an External Law. Other writers simplified these divisions to some extent; but still a most unnecessary and unprofitable elaboration was kept up. Even Wheaton accepts the distinction between a Natural and a Voluntary Law of Nations, and argues that the Voluntary Law is a *genus*, comprising the two *species* of Conventional Law introduced by treaty, and Customary Law derived from usage.<sup>1</sup> But, like other writers, he forgets or ignores these distinctions when he sets forth the actual rules of his science. He does not then give us a chapter or two on Natural Law and many chapters on Voluntary Law with its two great subdivisions. But instead we have a most able and instructive series of chapters on the various rights possessed by states, and on War and Neutrality, in the course of which we are not even informed whether a given rule comes from convention or from usage, so completely are the divisions originally given dropped when the work of dealing with the subject in a systematic manner is seriously undertaken. Divisions which do not divide are useless; and in the present case some of them are mischievous as well, for they imply a belief in the theory that by some process of reasoning or intuition a law can be evolved which is binding on states apart from their consent, and thus tend to revive the old confusion between what is and what ought to be. Instead of attempting the unprofitable task of distinguishing the rules of International Law according to their origin, it is better to divide the subject into heads according to the different kinds of rights possessed by states and their corresponding obligations.

<sup>1</sup> *International Law*, § 9.

## § 68.

If we make our attempt at division on the lines just indicated, we shall find at once that states possess, by virtue of the law they have created for themselves, certain rights and obligations in their ordinary condition of peace, and that certain other rights and obligations are obtained, in addition to or in qualification of these, when a state is in the condition of belligerency or neutrality. Fortunately, in the modern world, peace is regarded as the usual and proper condition for nations. No writer would now venture to say with Machiavelli, "A prince is to have no other design, or thought, or study but war, and the art and discipline of it."<sup>1</sup> We have come to regard the business of good government as the most important art of rulers, and to include in it the practice of all honorable means of avoiding war. The rights and obligations which belong to states in their capacity of members of the family of nations are connected with peace and the state of peace. They may be called normal rights and obligations, and they are possessed by every independent state which is a subject of International Law. Just as the law of the land clothes every child born under its authority with certain rights which are his through no act of his own, so International Law gives to the states under its authority certain rights which belong to them through the mere fact of subjection to it. And just as an individual can, by the exercise of his will, place himself in a position whereby he acquires rights and obligations he did not possess before, so a state can by an act of corporate volition place itself in a position whereby it acquires rights and obligations it did not possess before. No man, for instance, can marry without making up his mind to do so; and no state can go to war or remain neutral in a war between other states without making up its mind to do so. But if a man does enter into matrimony, he

States possess  
normal and ab-  
normal rights and  
obligations.

<sup>1</sup> *The Prince*, Ch. XIV.

acquires rights which did not belong to him as a mere subject and citizen, and comes under obligations which were not binding upon him in his previous condition; and if a state becomes a belligerent or a neutral, it acquires rights and becomes liable to obligations of which it knew nothing as a mere subject of International Law. A belligerent, for example, has, in the right of search, a power over neutral vessels it could not exercise in its ordinary condition of peace;<sup>1</sup> and its obligation to submit to restrictions upon the freedom of its cruisers to stay in the ports of friendly powers and make what purchases they please there, modifies a previously existing right of unrestricted intercourse.<sup>2</sup> Those rights and obligations which a state possesses as a belligerent or a neutral we may call abnormal, to distinguish them from the normal rights and obligations which belong to it as a subject of International Law. And this distinction is fundamental. It gives us our first great division, and is the pivot on which our whole classification turns.

### § 69.

Starting, then, with the normal rights and obligations of states, we find that they are concerned with Independence, Property, Jurisdiction, Equality, and Diplomacy. Each of these gives us an important subject, fairly well marked off from other subjects, and capable of being treated by itself as a distinct head. The rules of International Law group themselves under these heads in a convenient manner without much overlapping; and we thus obtain a means of dividing one portion of our subject into titles or chapters in a way which shows the relation of its various parts to one another and to the whole. The other great division, that of the abnormal rights and obligations of states, naturally falls under two heads—those of War and

Normal rights and obligations are connected with Independence, Property, Jurisdiction, Equality, and Diplomacy; abnormal rights and obligations with War and Neutrality.

<sup>1</sup> See § 210.

<sup>2</sup> See § 251.

Neutrality. Each of these is very important, and requires more space for its consideration than any one of the subjects enumerated in connection with normal rights and obligations. We shall, therefore, subdivide them when we come to deal with them in detail. Here it will be sufficient to remark that, since normal rights and obligations are connected with peace, we obtain a division of International Law into the Law of Peace, the Law of War, and the Law of Neutrality, each of which will be considered in one of the three following parts of this book. The subjoined table will enable the student to see at a glance the arrangement of our subject we propose to adopt.

## INTERNATIONAL LAW.

Normal Rights and Obligations of States.	{	(1) Rights and Obligations connected with Independence.	}	Law of Peace.
		(2) Rights and Obligations connected with Property.		
		(3) Rights and Obligations connected with Jurisdiction.		
		(4) Rights and Obligations connected with Equality.		
		(5) Rights and Obligations connected with Diplomacy.		
Abnormal Rights and Obligations of States.	{	(1) Rights and Obligations connected with War.	}	Law of War.
		(2) Rights and Obligations connected with Neutrality.		Law of Neutrality.

The divisions of this table are clear and definite, and it is hoped that the principles on which they are based will commend themselves to the judgment of intelligent readers.

## PART II.

### THE LAW OF PEACE.



#### CHAPTER I.

##### RIGHTS AND OBLIGATIONS CONNECTED WITH INDEPENDENCE.

##### § 70.

INDEPENDENCE may be defined as *The right of a state to manage all its affairs, whether external or internal, without interference from other states, as long as it respects the corresponding right possessed by each fully-sovereign member of the family of nations.*

Definition and nature of the right of independence.

This right of independent action is the natural result of sovereignty: it is, in fact, sovereignty looked at from the point of view of other nations. When a state is entirely its own master, it is sovereign as regards itself, independent as regards others. Independence is, therefore, predicated by modern International Law of all the sovereign states who are its subjects.

But it must not be forgotten that, till the time of Grotius, the notion of universal sovereignty was the dominant conception in the minds of thinkers and writers on international relations. They held that there was, or at least that there ought to be, a common superior over nations. The last lingering remnants of this idea were shattered in the storms of

the Reformation, and the doctrine of the independence of states was substituted for it by the great Protestant jurists to whom we owe the form which International Law has assumed in modern times. There is a tendency on the part of many writers to regard independence and sovereignty as attributes of states, conferred on them in some mysterious manner, quite apart from the provisions of the law which defines their rights and obligations. We are told that they spring from the nature of the society existing among nations, that they are necessary to the conception of a state, or that they are conferred by the Great Author of society. Such speculations are shown to be baseless by a simple reference to the facts of history. States, like individuals, have what rights are conferred upon them by the law under which they live. There was a time when their full independence was denied by the law then existing. But since the Peace of Westphalia of 1648 brought into existence the modern European order, the principle of complete independence has been accepted by statesmen and embodied in the international code of the civilized world.

### § 71.

Part-sovereign states do not possess the right of independence to the full, though to save appearances they are sometimes spoken of in diplomatic documents as independent. But it is clear that limitations on their external sovereignty are also limitations on their independence. For instance, by Article 4 of the Treaty of February 27, 1884, the Transvaal Republic of South Africa agreed to make "no treaty with any other state, other than the Orange Free State, nor with any native tribe east or west of the Republic, without the approval of Great Britain." Inasmuch, therefore, as the rulers of the Transvaal are bound to obtain the assent of Great Britain before they can take effective action in a most important sphere, the Boer Republic cannot,

Part-sovereign  
states not fully  
independent.

in strictness, be said to possess the full rights of independence, though it is called an independent state in treaties and despatches.

## § 72.

Even in the case of fully sovereign states, and in regard to the conduct of the most powerful among them, restrictions upon unlimited freedom of action are imposed temporarily by events and circumstances; but since they are not permanent legal incidents of the political existence of the communities subjected to them, but are in the main necessary conditions of social life imposed by the good sense of the powers concerned, they do not detract from the independence and sovereignty of the states which live under them. They often spring from treaty stipulations entered into voluntarily by governments to avoid difficulties in their future intercourse. For example, the United States and Great Britain bound themselves by the Clayton-Bulwer Treaty of 1850 to acquire no territory in Central America;<sup>1</sup> and in 1886 Great Britain and Germany made a formal declaration whereby the limits of their respective spheres of influence in the Western Pacific were defined, and each power pledged itself not to intrude into the region assigned to the other.<sup>2</sup> Another source of self-imposed restrictions upon the freedom of action granted by the right of independence is to be found in consideration for the corresponding right of other states. Just as in the society formed by individuals, friendly intercourse would be impossible if each insisted upon using the full freedom secured to him by law without regard to the feelings and convenience of his neighbors, so in the society of nations a similar abstinence is necessary, if peace and harmony are to be preserved. Mutual concession is the price paid for social life. A state which conducted its foreign policy, regulated

Voluntary restrictions upon the freedom of action of sovereign states.

<sup>1</sup> *Treaties of the United States*, p. 441.

<sup>2</sup> *British State Papers, Western Pacific, No. 1 (1886)*.

its commerce, and exercised its jurisdiction without thought or care for the wishes and interests of other states, would doubtless be within its strict right as an independent political community; but it would soon discover that it was regarded as an international nuisance and subjected to an exceedingly unpleasant process of retaliation.

### § 73.

Sometimes an independent state finds itself obliged to submit for a while to restraints imposed upon it by superior force, as when Prussia was forbidden by Napoleon in 1808 to keep up an army of more than 40,000 men,<sup>1</sup> and Russia and Turkey were compelled by the Treaty of Paris of 1856 not to build "military-maritime arsenals" on the coast of the Black Sea, and not to maintain ships of war thereon.<sup>2</sup> Such stipulations as these are not uncommon in the history of international transactions. They are frequently imposed on a defeated belligerent as part of the price of peace. The powers subjected to them constantly evade them, and always take the first opportunity of throwing them off. Prussia foiled Napoleon's design of keeping her powerless as a military state by passing the pick of her able-bodied young men through her small army and keeping them trained in a reserve force; and Russia took advantage of the Franco-Prussian war of 1870 to obtain by the Convention of London of 1871 a formal release from her engagements as to the Black Sea.<sup>3</sup> Such limited and temporary restraints upon the freedom of action of a state are not held to derogate from its independence. They are passing incidents in its career, not permanent legal conditions of its existence. And the same thing may be said of the authority assumed by the Great Powers of Europe in the Old World and the United States on the American continent. There

Involuntary re-  
strictions upon the  
freedom of action  
of sovereign states.

<sup>1</sup> Fyffe, *Modern Europe*, I., 382.

<sup>2</sup> Holland, *European Concert in the Eastern Question*, p. 247. <sup>3</sup> *Ibid.* p. 273.



can be no doubt that the Great Powers have, on several occasions, acted in the name and on behalf of all Europe,<sup>1</sup> and that the smaller states have willingly or unwillingly accepted the arrangements made by them. In America there seems an increasing tendency to accord to the United States a position of primacy. But it would be mere pedantry to assert that occasional deference to the will of one or the other of these authorities deprived a state of its independent position under the law of nations.

#### § 74.

The right of independence conferred by International Law upon each fully sovereign member of the family of nations involves, as we have seen, complete liberty on the part of every state to manage its affairs according to its own wishes. It may change its form of government, alter its constitution, form its alliances, and enter upon its wars according to its own views of what is just and expedient. But sometimes it happens that another state, or a group of states, interferes with its proceedings, and when it is engaged in internal turmoil or external conflict endeavors to compel it to do something which, if left to itself, it would not do, or refrain from doing something which, if left to itself, it would do. Interference of this kind is called intervention. History teems with instances of it. It has been undertaken on various pretexts, and justified by the most diverse reasonings. In every case of it the burden of proving justification rests upon the intervening power; for it is in its very nature an infringement of the independence of the state subjected to it, and therefore a violation of an acknowledged principle of International Law. Let us first distinguish intervention from other forms of interference which might possibly be confounded with it; and, having done this, we shall then be in

Intervention — its essential characteristics.

<sup>1</sup> See §§ 128, 129.

a position to discuss whether it is ever justifiable, and, if so, under what circumstances.

The essence of intervention is force, or the threat of force, in case the dictates of the intervening power are disregarded. It is, therefore, clearly differentiated from mere *advice* tendered by a friendly state without any idea of compulsion, from *mediation* entered upon by a third power at the request of the parties to the dispute but without any promise on their part to accept the terms proposed or any intention on its part to force them to do so, and from *arbitration*, which takes place when the contestants agree to refer the dispute to an independent tribunal and consent beforehand to abide by its award, though it possesses no power to compel obedience to its decisions. There can be no intervention without, on the one hand, the presence of force, naked or veiled, and, on the other hand, the absence of consent on the part of the combatants. There have been instances where one party to the dispute has asked for the intervention of a third power; but if both parties agree in such a request the interference ceases to be intervention and becomes mediation. Should the mediating state find the parties unwilling to accept its proposals and decide to compel them by force of arms, its action would then lose the character of peaceful mediation and assume that of warlike intervention.

### § 75.

There are few questions in the whole range of International Law more difficult than those connected with the legality of intervention, and few which have been treated in a more unsatisfactory manner by the bulk of the writers upon the subject. Some have confined themselves to general propositions; while others have devoted much time and labor to an examination of one or two specific instances with regard to which they happened to hold strong opinions. But it

General principles  
with regard to  
intervention.

is difficult to find anywhere a wide survey of historical instances and an attempt to refer them to principles, laudable or blameworthy. Yet this deficiency in the treatment of a great subject is hardly to be wondered at. We can generally deduce the rules of International Law from the practice of states; but in this case it is impossible to do anything of the kind. Not only have different states acted on different principles, but the action of the same state at one time has been irreconcilable with its action at another. On this subject history speaks with a medley of discordant voices, and the facts of international intercourse give no clue to the rules of International Law. We might, indeed, deem that the search for rules of any kind was hopeless, were it not that it is possible to deduce certain clear and unmistakable precepts from principles admitted on all sides. No one doubts the existence of the right of independence, or the duty of self-preservation, and from these we are able by a process of deduction to obtain what we are in search of.

### § 76.

Every state is bound to respect the independence of its neighbors as a fundamental principle of International Law; but a regard for its own safety is still more fundamental, and, if the two principles clash, it naturally and properly acts upon the latter.

Intervention  
based on the ne-  
cessity of self-  
preservation.

The doctrine that self-preservation, or the preservation of what is more precious even than life, overrides ordinary rules, is in no way peculiar to the law of nations. In every civilized state homicide is a crime of the greatest magnitude; yet a woman who slays a man in defence of her honor is accounted blameless. It is universally true that the law of the land protects property; yet in the case of actual invasion military authorities are allowed to destroy property, if such destruction is necessary for the performance of warlike operations against an enemy in the field. By apply-

ing the principle which underlies these instances to the case of intervention, we obtain the rule that

*Intervention to ward off imminent danger to the intervening power is justifiable.*

But we must note carefully that the danger must be direct and immediate, not contingent and remote, and, moreover, it must be sufficiently important in itself to justify the expenditure of blood and treasure in order to repel it. The mere fear that something done by a neighboring state to-day may possibly be dangerous to us in the future if that state should happen to become hostile, is no just ground of intervention. If it were, nations might always be at war to-day to prevent war fifty years hence! Further, the cause which justifies intervention must be important enough to justify war. Governments constantly submit to small inconveniences rather than resort to hostilities; and an evil which is not sufficiently grave to warrant a recourse to the terrible arbitrament of battle is not sufficiently grave to warrant intervention.

### § 77.

We have seen how the duty of self-preservation may override the duty of respect for a neighbor's freedom of action.

Intervention  
based on treaty-  
right.

It must now be pointed out that this is not the only exception to the general principle of non-intervention. States constantly enter into agreements which modify their rights and duties as defined by International Law; and we cannot say that treaty stipulations of any kind are forbidden by it, though it is easy to find agreements which are condemned by enlightened morality. We must, therefore, lay down the further rule that

*Intervention in pursuance of a right to intervene given by treaty is technically justifiable.*

We ought, however, to add that treaties which give such a right are almost always unwise, and are found afterwards to

involve the signatory powers in difficulties from which they cannot escape without loss of honor or dignity.

### § 78.

The last exception to the ordinary rule is based upon the principle that a state may lawfully interpose to prevent illegal action on the part of other states. War to rebut the aggressions of an unscrupulous neighbor is the most just and necessary of all wars. Intervention to prevent an unscrupulous neighbor from aggressive interference in the concerns of a third power is the most unselfish of all interventions. If a state may without blame defend its own integrity and honor, it may defend the menaced integrity and honor of a friend and be accounted no violator of the law of nations. We obtain, therefore, a third and last rule, which is that

*Intervention based on protection of another state against illegal intervention.*

*Intervention to prevent or terminate the illegal intervention of another state is justifiable.*

But we must distinguish here between justification as between the states concerned and justification as between the intervening government and its subjects. The former may be complete, while the latter is woefully lacking. A power which spent its strength in redressing the wrongs of other powers, and imposed thereby on its own people burdens and sacrifices out of all proportion to the good it effected by its enterprises, would neglect its first duty and lay itself open to grave blame in spite of the purity of its intentions.

### § 79.

The rules we have just laid down cover every case in which intervention is legal. With regard to the second and third of them, the justification is little more than technical. It is only when a state intervenes to preserve itself from some grave and imminent danger that we can regard its action as

*Interventions on grounds of humanity and interventions to stop persecutions.*

beyond the scope of criticism. In the opinion of some writers interventions undertaken on the ground of humanity and interventions for the purpose of putting a stop to religious persecutions are also legal. But we cannot venture to bring them within the ordinary rules of International Law. It certainly does not lay down that cruelty on the part of a government renders it liable to be deprived of its freedom of action, nor does it impose upon states the obligation of preventing either ordinary barbarity on the part of their neighbors, or that special kind of inhumanity which takes the form of religious persecution. At the same time, it will not condemn such interventions if they are undertaken with a single eye to the object in view and without ulterior considerations of self-interest and ambition. Should the cruelty be so long continued and so revolting that the best instincts of human nature are outraged by it, and should an opportunity arise for bringing it to an end and removing its cause without adding fuel to the flame of the contest, there is nothing in the law of nations which will condemn as a wrong-doer the state which steps forward and undertakes the necessary intervention. Each case must be judged on its own merits.

There is a great difference between declaring a national act to be legal, and therefore part of the order under which states have consented to live, and allowing it to be morally blameless as an exception to ordinary rules. I have no right to enter my neighbor's garden without his consent; but if I saw a child of his robbed and ill-treated in it by a tramp, I should throw ceremony to the winds and rush to the rescue without waiting to ask for permission. In the same way, a state may, in a great emergency, set aside every-day restraints; and neither in its case nor in the corresponding case of the individual will blame be incurred. But, nevertheless, the ordinary rule is good for ordinary cases, which, after all, make up at least ninety-nine hundredths of life. To say that it is no rule because it may laudably be ignored once or twice in a generation, is to overturn order in an attempt to exalt

virtue. An intervention to put a stop to barbarous and abominable cruelty is "a high act of policy above and beyond the domain of law."<sup>1</sup> It is destitute of technical legality, but it may be morally right and even praiseworthy to a high degree.

### § 80.

We are now in a position to consider the grounds of intervention which have been put forward from time to time by states. The history of wars and diplomatic transactions shows that rulers have been much too eager to meddle with the concerns of their neighbors, and ambitious powers have often seized upon colorable pretexts for controlling the destiny of weaker states. We will attempt to classify interventions under various heads, giving instances of each, and applying the principles we have adopted to a consideration of their legality.

Grounds of intervention put forward on various occasions.

### § 81.

Protection from imminent danger has been frequently put forth as a justification for interference; and, if the plea is good in fact, it is undoubtedly sound in law. Thus, when in 1804 the British Ministry discovered that Spain had entered into arrangements to assist France, then at war with England, and was preparing a naval armament in the harbor of Ferrol, they were justified in remonstrating strongly and in commencing hostilities when their remonstrances were disregarded.<sup>2</sup> Another instance is furnished by the conduct of Austria in 1813. At the close of the armistice granted by Napoleon after the battle of Bautzen, it joined Russia and Prussia against France, the reason being that the French Emperor had rejected its offers of mediation on the basis of reasonable concessions on his part, and had brought up the army of Italy

Protection from imminent danger.

<sup>1</sup> Historicus, *Letters on Some Questions of International Law*, I.

<sup>2</sup> *Annual Register for 1805*, pp. 20-27.

to intimidate it.<sup>1</sup> It had to choose between a continuance of the degrading tutelage it had been under since 1809, and the striking of a manly blow for political emancipation. It chose the latter, intervened in the great struggle, and assisted in the liberation of Europe from the intolerable tyranny of Napoleon. Its national independence and the integrity of its territory was at stake, and there can be no doubt that its conduct was in accordance with the strictest rules of International Law on the subject of intervention.

### § 82.

Statesmen have sometimes endeavored to justify an intervention on the ground that it was necessary in order to ward off the illegal intervention of another power.

Protection of  
another state  
from illegal  
intervention.

The best example of this in recent history is the British expedition to Portugal in 1826.<sup>2</sup>

The lawful and constitutional Queen, Donna Maria, was an infant; and the Regency found themselves involved in a struggle with her uncle, Don Miguel, who had put himself at the head of the absolutist party, and was opposed to the constitutional charter. Ferdinand VII. of Spain sympathized with Miguel, and allowed Spanish territory to be used as a secure base of operations for the expeditions of the Portuguese pretender, though he had promised the British Government not to interfere in the struggle.<sup>3</sup> Mr. Canning, who was then Foreign Secretary of Great Britain, was careful to disclaim any intention of interfering in the internal affairs of Portugal. He declared that when the British troops landed in the country "nothing would be done by them to enforce the establishment of the constitution, but they must take care that nothing was done by others to prevent it from being fairly carried into effect."<sup>4</sup> Other

<sup>1</sup> Fyffe, *Modern Europe*, I., 490-496.

<sup>2</sup> Wheaton, *History of the Law of Nations*, Pt. IV., § 24.

<sup>3</sup> *Annual Register for 1826*, pp. 191-205, 310-344.

<sup>4</sup> *Speech in House of Commons, Dec. 11, 1826.*



reasons for the intervention were put forward, but the main contention that it was entered upon to prevent the illegal interference of Spain was a sufficient technical justification. It was, however, little more. There can be no doubt that Great Britain did ardently desire the success of the constitutional cause and the exclusion of Spanish influence from the Portuguese kingdom. There would have been no intervention had Donna Maria been an absolute ruler, and Don Miguel a champion of freedom.

### § 88.

Numerous treaties of guarantee have been entered into by civilized powers, and though they are not so frequent in modern times as they used to be a century or two centuries ago, they are quite numerous <sup>Treaty-right.</sup> enough to involve states in many difficulties which they would have escaped had they preserved their freedom of action. Sometimes intervention is asked for under such treaties from a government unwilling to give it; sometimes it is thrust, in accordance with their provisions, upon communities unwilling to receive it. The Republic of Columbia has several times appealed for aid to the United States to protect the railway across the Isthmus of Panama from the attacks of insurgents, and has based its requests upon the treaty of 1846. By the thirty-fifth article of this treaty the United States guaranteed the "perfect neutrality" of the isthmus, and Columbia's "rights of sovereignty and property" over it. But though the Government of Washington has sometimes sent a force to Panama, it has always denied that it was under any obligation to Columbia to defend the route across the isthmus against local insurrection, and maintained that its guarantee refers only to the case of attack from foreign powers.<sup>1</sup> We need not go back very far in modern history to discover instances in Europe where

<sup>1</sup> *Treaties of the United States*, pp. 208, 1275.

states have been glad to find some loophole of escape from guarantees unwisely entered into not long before. On April 15, 1856, England, France and Austria guaranteed "jointly and severally the independence and integrity of the Ottoman Empire."<sup>1</sup> When the great war between Russia and Turkey broke out in 1877 the late Earl Derby, who at that time held the seals of the English foreign office, contended that Great Britain was not obliged to interfere under it for the protection of Turkey, unless France and Austria resolved to do so and formally called upon her to assist them. It would be easy to multiply instances. Indeed, almost the only case in recent times where prompt and efficacious measures have been taken in pursuance of a guarantee is to be found in the conduct of Great Britain when the neutrality of Belgium was threatened in 1870 during the Franco-Prussian war. She immediately concluded two conventions, — one between herself, Belgium, and Prussia, and the other between herself, Belgium, and France. The first stipulated that, in case France violated Belgian integrity and neutrality, Great Britain would join her forces with those of Belgium and Prussia to repel the attack. The second contained exactly similar stipulations *mutatis mutandis*, to meet the case of an attack by Prussia.<sup>2</sup> These vigorous methods attained their object. Belgium was left unmolested by both the belligerents and the British guarantee of her neutrality contained in the treaties of 1831 and 1839 shown to be a living reality.<sup>3</sup> Obvious considerations of policy dictated the action of the English Ministry on this occasion. It would probably have been what it was had no previous guarantee existed. States would do well to shun such perilous expedients, which do but tide over an immediate difficulty by storing up trouble for future time. But, nevertheless, when a treaty of guarantee exists, it is impossible to

<sup>1</sup> Holland, *European Concert in the Eastern Question*, pp. 259, 260.

<sup>2</sup> Hertslet, *Map of Europe by Treaty*, III., 1886-1891.

<sup>3</sup> Wheaton, *History of Law of Nations*, Pt. IV., § 26.

say that the power which acts on it is technically a law-breaker. And this is true of that most objectionable class of treaty which guarantees a particular form of government in a state, or the succession to the throne to a particular family, and thus gives to the guaranteeing power the right to interfere in the internal concerns of its neighbor. There is the right, however much we may dislike it. We may visit with the severest moral condemnation the state which insists on acting upon it; but we cannot brand the action as illegal. The ethical level of the actor may be that of the money-lender who ruins a poor man by exacting the last farthing of the two or three hundred per cent due to him under an improvident bond; but, like the money-lender, he has the letter of the law on his side. The only kind of guarantees not open to objection seem to be those entered into by the collective body of states, or by the leading powers acting on their behalf, for the purpose of neutralizing a territory or a water-way under the public law of the civilized world.

#### § 84.

Intervention at the request of one of the parties to a civil war is not uncommon. A recent instance occurred in 1849, when, at the request of the Austrian Government, Russia came to its assistance in its struggle with the Hungarian insurgents. The fact that the intervening power is asked to interfere by one of the belligerents is often put forward as a sufficient justification for its action, and there are not wanting writers who argue in support of this view. Some publicists deny the legality of intervention at the request of rebels, but are disposed to look more favorably upon intervention at the request of established governments.<sup>1</sup> Others hold that foreign powers may assist the party which appears to them to have justice on its side.<sup>2</sup> Both views are examples of that loose mode of

Request of one of  
the parties to the  
struggle.

<sup>1</sup> e.g. Woolsey, *International Law*, § 42.

<sup>2</sup> e.g. Vattel, *Droit des Gens*, II., § 56.

thinking which mistakes moral preferences for legal principles. Any intervention in an internal struggle is an attempt to prevent the people of a state from settling their own affairs in their own way, and, as such, a gross violation of national independence. The request of one of the parties cannot alter the quality of the act, and render legal that which without it would be contrary to the fundamental principles of the law. It makes no difference whether the invitation comes from the established authorities or from rebels. In neither case can an incitement to do wrong render the act done in consequence of it lawful and right.

### § 85.

From the middle of the seventeenth century till recent times, it was an undoubted maxim of European diplomacy that what was called the Balance of Power must be preserved at all risks. The courts and cabinets of the Old World were dominated by the idea that the chief states of Europe ought to possess such a nicely proportioned share of power that no one of them should be able to greatly outweigh the others in influence and authority. It was held that a sort of international equilibrium of forces had been established, and that any state which attempted to destroy its nice adjustments might be attacked by others whose relative importance would be diminished if it were permitted to carry out its projects. For a long time this doctrine was accounted axiomatic. It had only to be stated to be accepted. To preserve the Balance of Power, states kept up standing armies,<sup>1</sup> entered into wearisome negotiations and waged incessant wars. But of late years it has fallen into disrepute, and those who still

Preservation of  
the Balance of  
Power.

<sup>1</sup> See *Preamble to the old British Mutiny Act*: "And whereas it is adjudged necessary by His Majesty and this present Parliament that a Body of Forces should be continued for the Safety of the United Kingdom, the Defence of the Possessions of His Majesty's Crown, and the Preservation of the Balance of Power in Europe."

maintain it set it forth in a greatly modified form. They are content to argue that civilized states have duties to perform to the great society of which they are all members, and that they should act in concert against any aggressive member of it whose unsocial conduct endangers the welfare of the whole. It is possible to accept this doctrine and yet to hold that the theory of a Balance of Power is untenable. Indeed, its most complete condemnation is to be found in the history of the interventions undertaken to uphold it. What, for instance, could be a greater *reductio ad absurdum* of the theory than the results of the intervention of the Grand Alliance at the beginning of the eighteenth century in order to prevent the union of the crowns of France and Spain? It was thought that this undesirable result would take place if Philip V., a grandson of Louis XIV. of France, were suffered to remain upon the Spanish throne. Between him and the French crown, if the aged Louis XIV. should die, there was for a time only the life of his elder brother Louis, Duke of Burgundy, and afterwards in addition the life of the Duke's infant son, who in 1715 became Louis XV. of France. Both these lives were very bad, and for several years nothing seemed more probable than the speedy accession of Philip to the throne of France. The allies, therefore, determined to drive him from Spain and set up at Madrid in his stead the Archduke Charles, second son of the Emperor Leopold I. Joseph, the elder brother, was young and healthy, and likely to be the progenitor of a vigorous race. He would succeed his father on the imperial throne, but it was thought there could be no danger of his death opening the succession to Charles. Yet he died childless in 1711, after having reigned in Vienna for six years, and was succeeded by his brother; while the sickly infant who afterwards became Louis XV. lived to old age. The attempt of the allies to deprive Philip of the Spanish crown failed. Had it succeeded, they would have brought about the very disturbance of the European equilibrium which they took up arms to avoid.

The Imperial and Spanish crowns would have been united on one head, a consummation as full of danger to the Balance of Power as the union of France and Spain under one king. If the Allies had been content to wait for the anticipated danger to become actual before they took up arms to avert it, they need not have gone to war at all.<sup>1</sup>

A political system which tends to stereotype the existing order of things in international affairs is fatal to progress. Yet underlying the theory of the Balance of Power was always the assumption that the division of territory and authority among the chief states of Europe at any given time was the right and proper division, and must be maintained at all costs. In actual fact, the order which it was sought to preserve was constantly changing. At one period the state of possession established by the Peace of Vienna of 1815 was regarded as sacred, at another the appeal was to the Peace of Utrecht of 1713, at a third to that of Westphalia of 1648. The world moved in spite of the efforts of rulers to keep it stationary, and they had to adjust their theories to its changes. But in doing so they found in the idea of a Balance of Power a cloak for ambitious schemes. If one state desired to pick a quarrel with another, it was easy to allege that some action on the part of the latter threatened the European equilibrium. Under cover of such an accusation demands for concessions of all kinds could be made. The last development of the balance theory in this direction was due to the ingenuity of the Emperor Napoleon III. He put forth the doctrine that whenever another state was greatly aggrandized, France must have territorial compensation, in order that the relative power of the two nations might remain constant. He obtained the cession of Savoy and Nice in 1860 as compensation for the creation of the Kingdom of Italy; but he failed entirely in his efforts to obtain compensation for the unification of North Germany in 1866. Prince Bismarck alleged that such a spirit of

<sup>1</sup> Wheaton, *History of the Law of Nations*, Pt. 1, § 2.

German patriotism had been aroused by the victories of Prussia, that it was impossible for him to cede a yard of German territory to France. In saying this, he incidentally laid bare the main defect of the theory of a Balance of Power. It takes no account of any other motives of state policy than the personal aggrandizement of rulers and the territorial extension of states. It distributes provinces and rounds off the boundaries of kingdoms without regard to the wishes of the populations and their affinities of race, religion, and sentiment. It represses popular movements when they interfere with its calculations. Italian unity and German unity have been achieved in spite of it, and it will become more and more discredited as the nations of Europe advance in self-government. There is but one good thing to be said for it. It did sometimes act as a restraint upon unscrupulous rulers, as when in 1668, the Triple Alliance of England, Sweden, and Holland without firing a shot, caused Louis XIV. to renounce for a time his designs upon the Spanish Netherlands. But even in this connection the good effects of the theory are rather accidental than essential. If the would-be plunderers can but agree beforehand on a division of the spoil, their victim will not be saved by any regard for a Balance of Power which remains unaffected by the transaction. This statement finds ample proof in the history of the three partitions of Poland between Austria, Prussia and Russia. Intervention on behalf of a system so full of evil finds no warrant in International Law. The independence of states is not to be violated on the ground of possible danger to some imaginary equilibrium of political forces. If the proceedings of one nation directly and seriously menace the safety of another, the threatened power has ample warrant for intervention in the principle of self-preservation. The law of nations allows it to take extreme measures on behalf of its integrity or its honor, but it gives no sanction to a violation of fundamental principles for the sake of a pernicious theory of artificial checks and balances.

The people of the United States have never been brought face to face with an international system based upon the doctrine of a Balance of Power. The political circumstances of the New World have happily prevented the growth of such a system on the American continent, and its importation from Europe has been avoided, owing to the wise policy of successive administrations from that of President Monroe onwards.

### § 86.

Interventions undertaken to put down or to uphold revolution are open to much the same objections as those we have urged against attempts to maintain a Balance of Power by force of arms. They are attacks upon the rights of states to manage their internal affairs in their own way. A successful revolution in favor of a republic is doubtless unwelcome to monarchical states, and a successful revolution in favor of monarchy is equally unwelcome to republican states. But from the point of view of International Law it is immaterial whether a revolution establishes one form of government or another, whether it restricts or widens liberty, whether it is in favor of or against popular institutions. The one thing other states have to consider is whether the new government created by the revolution commands the obedience of the people of the state, and is able to speak with authority on their behalf in its dealings with foreign powers. If it does, they must sooner or later recognize it. If it does not, they can ignore it. But in no case have they a right to interfere with it, always supposing that the revolutionists confine their activity to their own country and make no attempt upon the institutions of neighboring states. If they indulge in propagandist attacks upon other powers, they may with justice be restrained on grounds of self-preservation. The proceedings of the Holy Alliance afford the best example of illegal interventions entered upon in order to put down revolution. The Alliance

Interference with  
revolutions.



had its origin in an agreement entered into at Paris in September, 1815, between the sovereigns of Russia, Austria and Prussia, to rule justly and mercifully, to regard one another as brothers, to treat their subjects as children, and to apply to political and international affairs the precepts of the Christian religion.<sup>1</sup> These exalted sentiments depended for their political utility upon the manner of their application; and it soon became apparent that the Holy Alliance existed for the purpose of putting down all movements in favor of liberty among the continental states, on the ground that there existed a vast conspiracy against established power, and that the public law of Europe forbade reforms carried out by revolt and revolution. As a consequence of the Congresses of Troppau and Laybach of 1820 and 1821, Austrian troops put down popular movements in favour of political liberty in Naples, Sardinia, and other states; and in 1823, after the Congress of Verona, held in the previous year, French troops invaded Spain and restored Ferdinand VII. to the plenitude of his absolute power.<sup>2</sup> Great Britain refused to concur in any of these measures and "disclaimed any general right of interference in the internal concerns of independent nations."<sup>3</sup> She maintained that such intervention was justified only when the security and essential interests of the intervening state were threatened. The stand she took on behalf of sound principles threw her into open antagonism to the policy of the Holy Alliance, and brought about the famous agreement between the cabinets of London and Washington, which caused President Monroe to embody in his message of Dec. 2, 1823, the assertion that the United States would regard any attempt on the part of the Alliance to extend its system to the American continent as dangerous to their peace and safety. This declaration disposed of a plan then in contemplation for giving aid to Spain in the recon-

<sup>1</sup> Hertalet, *Map of Europe by Treaty*, I., 318.

<sup>2</sup> Wheaton, *History of the Law of Nations*, Pt. IV., §§ 22, 23.

<sup>3</sup> Canning, *Despatch to the French Chargé d'Affaires*, Jan. 10, 1823.

quest of her revolted transatlantic colonies, and joined with the vigorous measures of Mr. Canning, then Foreign Secretary of Great Britain, inflicted a fatal blow upon the prestige of the Holy Alliance.

### § 87.

Humanitarian interventions and interventions for the purpose of putting an end to religious persecution may be classified together; for the cruelties due to intolerance  
 Humanity. come under the general head of proceedings repugnant to humanity. It is easy to see that the right of a state to work out its own destiny in its own way would no longer exist, if International Law gave to other states a general right of interference whenever they were horrified at cruelties committed in the course of a war or an internal struggle. All sorts of ambitious projects would be able to shelter themselves behind an alleged feeling of humanity; for unfortunately there are few, if any, civil wars in which a greater or less amount of cruelty is not resorted to. But, as we have already discovered,<sup>1</sup> interventions on the ground of humanity have under very exceptional circumstances a moral, though not a legal, justification. It is generally held that the interference of Great Britain, France and Russia on behalf of the Greeks in 1827 and the following years is a case in point.<sup>2</sup> The contest between them and their Turkish oppressors had gone on for years, and had been marked throughout by the most horrible barbarities. It seemed as if it would end in the extermination of the whole Greek race. The intervention of the three powers preserved a people to whom civilization owed so much, and laid the foundation of a new order in Southeastern Europe, which, with all its defects, is infinitely preferable to the chaos of weltering barbarism that immediately preceded it. Again, when in 1860 the Great Powers intervened to put a stop to the persecution and massacre of Christians in the district of Mount Lebanon,

<sup>1</sup> See § 74.

<sup>2</sup> Wheaton, *History of the Law of Nations*, Pt. IV., § 28.

their proceedings were worthy of commendation, though they could not be brought within the strict letter of the law, and the same may probably be said of the indirect intervention whereby in 1878 the signatory powers of the Treaty of Berlin recognized the independence of Montenegro, Roumania and Servia, on condition that no person in those states should be under legal disability on account of his religious belief, or suffer molestation in the public worship prescribed by his creed.<sup>1</sup>

### § 88.

We have now gone through the various classes into which interventions may be divided. For the sake of clearness, we have treated each separate case as if it came under one or another of these heads and under that alone. But in actual life matters are not

Complication  
of most cases of  
intervention.

so simple. The same intervention often possesses a variety of aspects, and attempts are made to justify it on several grounds. The formation of a judgment upon it is difficult in proportion to its complication. Few international proceedings of recent years have been more bitterly attacked and more strongly defended than the present British intervention in Egypt, which has been carried on with armed force ever since 1882. It involves for Great Britain questions of self-interest with regard to the Suez Canal, questions of national honor with regard to the promises made to Tewfik Pasha in 1879, questions of good government with regard to the suppression of the Arabist movement and the reform of the administration, questions of finance with regard to the Egyptian debt, and questions of the rights of other states in connection with the dual control which was shared with France, and the suspension of the Law of Liquidation which was signed by no less than fourteen powers.<sup>2</sup> It will not be necessary to enter into the controversies which this

<sup>1</sup> Holland, *European Concert in the Eastern Question*, pp. 293-301.

<sup>2</sup> *Ibid.*, pp. 89-205.

intervention has aroused. We have referred to it in order to show how complicated such a proceeding can be, and how at every turn it involves disputes on matters of fact as well as legal principles. Moreover, several states may be concerned in one and the same intervention, and they may be actuated by different motives and put forth different justifications. Every case must be judged on its own merits in the light of the principles we have already laid down. We may add to them a few others, which, though not rules of International Law, will be found useful guides to correct conclusions. From what has been already said it follows, as a corollary, that interventions in the internal affairs of states are greater infringements of their independence than interference with their external action, which must, from the nature of the case, be concerned with other powers. Such interventions, therefore, should be watched with the utmost jealousy, and require the strongest reasons in order to justify them. Further, interventions carried on by the Great Powers as the representatives of European civilization, or by some state or states acting as their agent, are more likely to be just and beneficial than interventions carried on by one power only. But history seems to show that when two or three states combine in a temporary alliance for the purpose of regulating the affairs of some neighbor, they not only possess none of the moral authority attaching to the proceedings of the Great Powers, but are exceedingly likely to quarrel among themselves. England and Spain, for instance, soon withdrew from the unjustifiable intervention in Mexico, which they had undertaken in 1861 in conjunction with France, for the avowed purpose of obtaining from the Mexican Government payment of its debts to their subjects and better protection for foreigners resident in Mexico. In 1862 France began to give aid to the Imperialists, contrary to the terms of the convention between the intervening powers. The other two parties to the intervention, finding themselves in a false position, declined to proceed, and France, left to herself, placed the

Archduke Maximilian of Austria upon a precarious throne, which he lost, together with his life, in 1867.<sup>1</sup> The case of the intervention of the German Confederation in the Schleswig-Holstein question in 1864 is a more conspicuous warning still; for it ended in the war of 1866 between Austria and Prussia, the two chief intervening powers.

### § 89.

So prone are powerful states to interfere in the affairs of others, and so great are the evils of interference, that a doctrine of absolute non-intervention has been put forth as a protest against incessant meddling.

The doctrine of non-intervention.

If this doctrine means that a state should do nothing but mind its own concerns and never take an interest in the affairs of other states, it is fatal to the idea of a family of nations. If, on the other hand, it means that a state should take an interest in international affairs, and express approval or disapproval of the conduct of its neighbors, but never go beyond moral suasion in its interference, it is foolish. To scatter abroad protests and reproaches, and yet to let it be understood that they will never be backed by force of arms, is the surest way to get them treated with angry contempt. Neither selfish isolation nor undignified remonstrance is the proper attitude for honorable and self-respecting states. They should intervene very sparingly, and only on 'the clearest grounds of justice and necessity; but when they do intervene, they should make it clear to all concerned that their voice must be attended to and their wishes carried out.

<sup>1</sup> Wheaton, *International Law* (Dana's ed.), note 41; Calvo, *Droit International*, §§ 118-125.

## CHAPTER II.

### RIGHTS AND OBLIGATIONS CONNECTED WITH PROPERTY.

#### § 90.

INTERNATIONAL Law regards states as political units possessed of proprietary rights over definite portions of the earth's surface. So entirely is its conception of a state bound up with the notion of territorial possession that it would be impossible for a nomadic tribe, even if highly organized and civilized, to come under its provisions. The whole Law of Jurisdiction, much of the Law of Diplomacy, and many of the rules that govern war and neutrality, imply that the communities subject to them have sovereign rights over territory. But a state may hold non-territorial as well as territorial possessions; and it will be well to deal with them at once, in order that we may dismiss them from further consideration, and go on to consider the important questions connected with national ownership of land and water. The non-territorial possessions of a state are its buildings and chattels. Every civilized and independent political community possesses in greater or less abundance such things as palaces, museums, ships, forts, arsenals, arms, ammunition, pictures and jewels. They belong to it in its corporate capacity; and most questions which arise with regard to the right of ownership over them, or the right to use and enjoy them, are settled by Municipal Law. We refer, for instance, to the law of the land, and not to International Law, when we want to know when we may visit a national art gallery, or what compulsory

States are political units capable of holding both territorial and non-territorial possessions.

powers the Government has to take the land of private owners for the erection of forts and magazines upon it. It is only when war breaks out between two states, and such possessions as we are considering become subject to belligerent capture, that International Law steps in to settle the nature and limits of proprietary rights over them. The laws of war decide the extent of their liability to hostile seizure, and the kind and degree of control that can be exercised over them when seized. We shall examine these questions when we come to deal with belligerent rights. Meanwhile we may mention here that vessels belonging to the state — public vessels as they are called to distinguish them from ships which are the property of private individuals — need not necessarily be adapted for warlike purposes. If they are owned by the state, manned by individuals in its service, and navigated under the command of its officers, they are state property. Even if hired by the state, they are public ships while the hiring lasts, provided that they are entirely given up for the time being to the service of the government and are under the control of its officers. Sometimes the word of the commander has been held to be sufficient evidence of state ownership.

### § 91.

We will now proceed to a consideration of the rules of International Law with respect to the important group of subjects connected with a state's territorial possessions. We will begin by endeavoring to answer the question, Of what does a state's territory consist? It consists, first, of the land and water within that portion of the earth's surface which the state claims by legal title. All rivers and lakes which are entirely within its land boundaries are as much its territory as the soil they water. And if a river flows through several states, each possesses in full ownership that portion of the course which passes through its territory. But if one state holds the land on one bank of

Extent of a state's  
territorial  
possessions.

a river and another state possesses the opposite bank, the boundary line between them is drawn down the middle of the navigable channel, and includes the islands on either side.<sup>1</sup> The same rule holds good of frontier lakes, such as Lake Ontario, whose northern shore is Canadian territory while its southern coast belongs to the United States. In all these cases it will be noticed that water is held to be appurtenant to land, not land to water. The rules concerning them are taken with scarcely any alteration from the *Jus Gentium*, and are part of that heritage of Roman Law with which Grotius and his fellow-workers endowed the international code.

Secondly, a state's territory includes the sea within a three-mile limit of its shores. Along a stretch of open coast-line the dominion of the territorial power extends seawards to a distance of three miles, measured from low-water mark. The rule of the marine league was introduced at the beginning of the last century as a practical application of the principle laid down by Bynkershoek<sup>2</sup> and others, that a state's dominion over the sea should be limited to that portion of it which she can control from the land by means of her artillery, this being obviously all that can be needed to provide for her own safety. Her sovereign rights were to extend *quousque tormenta exploduntur*. And as at that time the furthest range of cannon was about three miles, the accepted maxim, *Terræ dominium finitur ubi finitur armorum vis*, seemed to dictate the marine league as the appropriate distance. Opposing views gradually died out, and there can be no doubt that, whatever difficulties may still linger as to bays and indentations, the rule we are discussing rests upon the solid basis of general consent. It has been adopted not only in the domestic legislation of maritime states; but also in great international documents, like the North Sea Fisheries Convention of 1882, which defined territorial waters as those which came

<sup>1</sup> Justinian, *Institutes*, II., i., 22, and *Digest*, XLI., i., 29; Wharton, *International Law of the United States*, I., 97.

<sup>2</sup> *De Dominio Maris*, Cap. II.



within three miles, measured from low-water mark along the coast of each of the signatory powers.<sup>1</sup> A few attempts have been made in recent times to extend the limit in order to keep pace with the increased range of modern artillery. For instance, in 1863 Mr. Graham, the United States Consul at Cape Town, demanded the release of the Federal merchant vessel, the *Sea Bride*, which had been captured by the Confederate cruiser *Alabama* within four miles of the shore, but outside the three-mile limit. He based his demand upon the doctrine that since the invention of rifled cannon territorial waters extended to at least six miles. The British Governor of Cape Colony declined to interfere, on the ground that the rule of the marine league held good.<sup>2</sup> Mr. Graham's action was not seriously backed by his Government; and in 1875 the United States joined Great Britain in strenuously resisting the repeated claim of Spain to a six-mile zone off the coasts of Cuba, a claim denied again in 1880.<sup>3</sup> It may be taken for granted that, in spite of a few tentative efforts at alteration,<sup>4</sup> the rule of the three-mile limit is part and parcel of modern International Law. The Institute of International Law is, however, showing a tendency to reopen the question. A report upon the subject was presented at the Geneva session of 1892;<sup>5</sup> but the full discussion of the matter was deferred to a future occasion. A revised report was prepared by Mr. T. Barclay for the session held at Paris in March, 1894.<sup>6</sup> It drew a sharp distinction between territorial waters and waters over which a neutral state should be allowed to exercise such authority as is necessary for the enforcement of its neutrality. On the ground that the marine league is insufficient to protect coast fisheries, it

<sup>1</sup> Hertslet, *Treaties*, XV., 795.

<sup>2</sup> British State Papers, *North America, United States (1864)*, LXII., 19-29.

<sup>3</sup> Wharton, *International Law of the United States*, §§ 32, 327.

<sup>4</sup> Bluntschli, *Droit International Codifié*, § 302; Phillimore, *Commentaries upon International Law*, Pt. III., Ch. viii.

<sup>5</sup> *Annuaire de l'Institut de Droit International*, 1892-1894, pp. 104-154.

<sup>6</sup> Troisième Commission, *Rapport par M. Barclay*.

suggested the extension of the territorial zone to six miles; and it gave to each neutral state the power of declaring to belligerents the number of marine miles it deems needful for the effective guarantee of its neutrality, provided that they do not exceed the range of cannon mounted on the shore. The maritime powers were recommended to meet in Congress in order to adopt these and other rules. The chief proposals of the Report were accepted by the Institute; but it is doubtful whether the suggested Congress will ever be held.<sup>1</sup>

In the third place, a state is held to possess, in addition to the marine league, narrow bays and estuaries that indent its coast, and narrow straits both of whose shores are in its territory. The case of such straits is ruled by a simple deduction from the principles already laid down. If the passage is less than six miles across, it is wholly territorial water, because a marine league measured from either shore covers the whole expanse. If it is more than six miles across, a league on either side belongs to the territorial power and the mid-channel is part of the open sea, which belongs to no state but is common to all for use and passage. With regard to bays and estuaries there is more doubt. The principle that such of them as are narrow should belong to the state which possesses the adjacent land, is universally admitted. For its own protection against possible enemies it is entitled to exercise the powers of ownership over what are really gates leading into its dominions. But when we come to define the exact extent of the waters which may properly be appropriated in pursuance of this principle, we find no general agreement. If the distance from point to point across the mouth of a bay is not more than six miles, that bay becomes territorial water under the accepted rule of the marine league. There is, however, a disposition to hold that the distance should be extended; but at present the common consent of nations has not fixed upon a generally accepted limit, though there is a considerable amount of authority in favor of ten miles.

<sup>1</sup> *Annuaire de l'Institut de Droit International, 1894-1895*, pp. 281-331.

This was the rule adopted in the Fishery Convention of 1839 between Great Britain and France;<sup>1</sup> and it was embodied in the Report of Mr. Barclay, to which allusion has just been made, but the Institute by a large majority raised the limit to twelve miles. The mixed commission appointed under the provisions of the Convention of 1853 between the United States and Great Britain for the purpose of settling claims made by the citizens of each nation upon the government of the other, dealt with fishery disputes, and decided against the claim of Great Britain that the Bay of Fundy was British territorial water, on the ground, among others, that the distance from headland to headland across its opening was greater than ten miles.<sup>2</sup> In 1888 a Fishery Treaty was negotiated at Washington between the two powers, but failed to come into operation on account of the refusal of the Senate of the United States to ratify it. It is, however, important for our present purpose, because it adopted the ten-mile line in the case of bays, creeks and harbors not otherwise specially provided for by its articles.<sup>3</sup> But it cannot be said that there is a definite rule of International Law on this matter, as there is in the case of the marine league. The claims of states to large tracts of marginal waters — claims which are themselves relics of yet wider claims to dominion over oceans and seas — increase the difficulty of the question. Some of them are dead or dormant; but when a valuable fishery is retained for native fishermen by the assertion of sovereignty over a bay of considerable size, or when considerations of self-protection or political advantage are prominent, we find that states insist upon and often obtain recognition of their demands, some of which are based upon very ancient precedent. Thus the Dutch claim to regard the Zuyder Zee as territorial water is generally recognized, and some writers hold that the United

<sup>1</sup> Hertslet, *Treaties*, V., 89.

<sup>2</sup> Wheaton, *International Law* (Dana's ed.), note 142; Wharton, *International Law of the United States*, § 305 a.

<sup>3</sup> British State Papers, *United States*, No. 1 (1888).

States possesses in full ownership Chesapeake and Delaware bays.<sup>1</sup> Great Britain has almost forgotten her pretensions to sovereignty over what she called the King's Chambers, that is to say, portions of open sea cut off by drawing imaginary lines from headland to headland along her coast; but they have never been formally withdrawn.<sup>2</sup> And by the Fishery Convention of 1839 already alluded to, exceptions were allowed to the ten-mile rule laid down in it. The utmost we can venture to say is that there is a tendency among maritime states to adopt this rule, and probably it will in time become the law of the civilized world. It is, however, universally conceded that when a bay or estuary is territorial water, the marine league is to be measured from the imaginary line across its entrance.

Lastly, a state possesses the islets fringing its coast. A hold on them is essential to its peace and safety. The question was raised in 1805 in the case of the *Anna*,<sup>3</sup> which was a ship of somewhat doubtful character, captured when flying the American flag by a British privateer near the mouth of the Mississippi. The seizure was made more than three miles from firm ground, but within a league of a chain of mud islets which fringed the coast and formed "a sort of portico to the mainland." The United States was neutral in the war between Great Britain and Spain, and its minister in London claimed the ship in the British Prize Court, on the ground that the capture was made within American territorial waters. The judgment of Lord Stowell sustained this contention and ordered the release of the ship. He held that the islands, though not firm enough to be habitable, must be regarded as part of the territory, since they were formed by *alluvium*<sup>4</sup> from the mainland, and their possession was necessary for the command of the river. "If they do

<sup>1</sup> Ortolan, *Diplomatie de la Mer*, II., VIII., 163; C. F. de Martens, *Précis*, § 42; Kent, *Commentary on International Law* (Abdy's ed.), 113, 114.

<sup>2</sup> Walker, *Science of International Law*, 170, notes 3 and 4.

<sup>3</sup> Robinson, *Admiralty Reports*, V., 373.

<sup>4</sup> Justinian, *Institutes*, II., i., 20.

not belong to the United States of America, any other power may occupy them, they might be embanked and fortified. What a thorn would this be in the side of America!" There can be no doubt of the justice of Lord Stowell's decision, and the rule which resulted from it has received general recognition.

### § 92.

Having seen of what a state's territory consists, we have now to discuss how it may be acquired. International Law recognizes as valid a number of titles. We will describe them one by one, and set forth in order the rules applicable to each. The first and perhaps the most important is

Legal modes of acquiring territory.  
(1) Occupation.

#### *Title by occupation.*

This title applies only to territory not previously held by a civilized state. We have already seen<sup>1</sup> that it was introduced into International Law by the jurists of the sixteenth and seventeenth centuries in order to settle the disputes which arose among the maritime nations of Europe with regard to their respective possessions in the New World. At first they seemed disposed to hold that mere discovery was sufficient to create a good and complete title. Thus Spain claimed the whole coast of America northward from Florida, because in 1513 Ponce de Leon was the first European to land there. But the English claimed the same coast on account of the discovery of Cape Breton or Newfoundland by John Cabot in 1497, and the exploration of the shore, from Nova Scotia to Cape Hatteras, by his son Sebastian in 1498. The exaggerated importance attached to first discovery did not long continue. The doctrine that it must be followed by some formal act of taking possession, some expression of the will of the state, as Vattel put it,<sup>2</sup>

<sup>1</sup> See § 39.

<sup>2</sup> *Droit des Gens*, I., § 207.

soon arose. Now and again in international controversies states laid stress upon it in order to support claims otherwise inadmissible; but it has been gradually deposed from the position it once occupied; and in modern times few, if any, authorities would be prepared to say that a good title to territory could be based by a state upon the bare fact that its navigators were the first to find the lands in question. It is true that the controversies of the seventeenth and eighteenth centuries, between the colonizing nations of Europe as to the extent of their possessions on the American continent, were largely settled by the sword; and where its aid was not invoked boundaries were determined rather by compromise, or the political exigencies of the moment, than by strict legal considerations. But, nevertheless, statesmen and publicists endeavored to find reasonable ground for national claims, whether they were referred to the battle-field or the council-chamber for settlement; and it is possible to deduce some approximation to a consistent body of doctrine from the history of the controversies and diplomatic transactions concerned with the disputes under consideration. The process of portioning out the American continent among civilized states was consummated in the middle of the nineteenth century when the Treaty of 1846 divided the great Northwest between the United States and the British Empire.<sup>1</sup> From that time onwards, if not before, every foot of ground in the New World was part of the territory of some civilized country, and no power was free to obtain fresh possessions therein by occupation. It seemed, therefore, as if the legal questions connected with that method of gaining an international title to territory had no more than an historic interest. They were superseded by new and pressing controversies far greater in immediate importance, and the space given to them in the works of publicists grew less and less. But the last few years have seen a great revival of interest in them, owing to that modern "scramble for Africa" which

<sup>1</sup> *Treaties of the United States*, p. 438.

has taken the place of the old "scramble for America." The discoveries of Livingstone, Speke, Grant, Burton, Stanley, and others have shown that the interior of the Dark Continent, instead of being a desert, is a vast and fertile territory, diversified in climate, elevation and productions, full of great lakes and pierced by mighty rivers, the most important of which are navigable for thousands of miles, or can be made so with little trouble and expense. The earth-hunger of the Old World has been aroused. The cupidity of some and the benevolence of others have led to countless expeditions of conquest, conversion and civilization. The absence of anything like wars of extermination waged against the natives, or wars of conquest waged by the colonizing powers against each other's settlers, point, in spite of much that is mean and sordid and cruel, to an improvement in international morality during the time that has elapsed since a partition of America was attempted by the early discoverers. Argument and compromise played but a little part in those proceedings; they have bulked large in the negotiations of the last few years with regard to Africa. The principles of occupation have been restudied and applied anew. Jurists have thrown into legal form the best opinions and most accepted doctrines of former ages. Their task has been one of no small magnitude, and it is not to be wondered at that their inquiries and reasonings have not always resulted in exact agreement among themselves. But the points of difference have been unimportant in comparison with the points of similarity; and each succeeding writer of repute has been able to add something to the work of digesting a mass of controversial arguments into a body of consistent law. We will endeavor to state as clearly as possible what may be deemed the modern doctrine of occupation, warning our readers, however, that in some of its parts it must be taken to represent tendencies towards law rather than rules of universal acceptance.

## § 93.

Occupation as a means of acquiring sovereignty and dominion applies only to such territories as are in the eye of International Law *res nullius*.<sup>1</sup> That is to say, they must be no part of the possessions of any civilized state. It is not necessary that they should be uninhabited. Tracts roamed over by savage tribes have been again and again appropriated, sometimes after some kind of compensation has been given to the natives for the intrusion of the white man upon them, sometimes with no regard for their claims and wishes. And even the attainment by the original inhabitants of some degree of civilization and political coherence has not sufficed to bar the acquisition of their territory by occupancy. All territory not in the possession of states who are members of the family of nations and subjects of International Law must be considered as technically *res nullius* and therefore open to occupation. The rights of the natives are moral, not legal. International Law knows nothing of them, though International Morality demands that they be treated with consideration.

Occupation is not effected by discovery. The world has become so well known that very little land remains to be discovered in modern times, and there is often great doubt and dispute with regard to the exploits of earlier navigators. The utmost that can be said for discovery to-day is that, if a navigator of one state came home with the news that he had found an island or district hitherto unknown, other states would be bound by the comity of nations to wait a reasonable time before sending out expeditions in order to annex it. We may add that though discovery alone does not give a title, it strengthens a title based on occupancy.<sup>2</sup> The best modern practice, and the views of the most acute

Occupation applies only to *res nullius* and consists of (a) Annexation plus (b) Settlement.

<sup>1</sup> *Digest*, XLI., i., 3.

<sup>2</sup> Wharton, *International Law of the U. S.*, I., 7; Maine, *International Law*, 66, 67.



and thoughtful publicists, give authority to the doctrine that effective international occupation is made up of two inseparable elements, — *annexation* and *settlement*. By the formal act of *annexation* the annexing state notifies its intention of henceforth regarding the annexed territory as a part of its dominions; and by the patent fact of *settlement* it takes actual physical possession of the territory and retains a hold upon it. The formalities accompanying annexation are not prescribed by International Law. In modern times it is usual to hoist the national flag and read a proclamation setting forth the intention of the government to take the territory in question as its own;<sup>1</sup> but any ceremony of clear import done on the spot in a public manner is sufficient. It must, however, be an undoubted act of the central government speaking on behalf of the state. If the proper authorities have sent out an official specially charged with the duty of making a particular acquisition, the act of annexation performed by him is in the highest degree a state act, and therefore valid. But subordinate authorities have no such power, and their proceedings would be null and void unless they were ratified by the supreme government.<sup>2</sup> Thus when in 1883 the Ministry of the British Colony of Queensland endeavored to annex on their own authority the greater part of the island of New Guinea, together with New Britain, New Ireland, and a large number of other islands off the north coast of Australia from longitude 141° to longitude 155°, the home government refused ratification of so sweeping an act. All it would consent to do was to add to the Empire a large portion of the southeast of New Guinea. This was done in 1884,<sup>3</sup> and at the end of that year Germany annexed another portion, and established a protectorate over the islands of New Britain and New Ireland, which had been discovered by Dampier, a great British navigator, in 1699, and

<sup>1</sup> *e. g.* Hertslet, *Treaties*, XVII., 670, 671.

<sup>2</sup> Maine, *International Law*, 66-68.

<sup>3</sup> Hertslet, *Treaties*, XVII., 678, 679.

nominally taken possession of for Great Britain in 1767 by Captain Cartaret of the Royal Navy. His act was, however, never ratified, and consequently it had no validity, though he bore the commission of King George III.<sup>1</sup> A private person cannot perform even an inchoate annexation. Any ceremony he may go through is invalid from the beginning, and incapable of ratification. In order to annex, a state act is necessary, which may be direct, as when it is done by an officer commissioned specially for the purpose or armed with a general authority to annex under certain circumstances, or indirect, as when it is performed by subordinate authorities on their own initiative, but afterwards ratified by the central government.

*Annexation* alone is incapable of giving a good title. It is necessary for effective occupation that some hold on the country be taken and maintained. This is done by *settlement*; that is to say, the actual establishment of a civilized administration and civilized inhabitants upon the territory in question and their continuous presence therein. They may be established at one spot or many. Their posts may be civil, or military, or a mixture of the two. They may live upon the resources of the country or upon supplies sent from home. But they must be a permanent community. A temporary camp withdrawn after a time to the mother-country will not be sufficient to keep alive rights of sovereignty over the territory purporting to be occupied. There must be a real possession, as Vattel argued nearly a century and a half ago.<sup>2</sup> Thus Great Britain has a settlement at Port Moresby in British New Guinea, and has established there a government and a central court, while Germany has placed her portion of New Guinea under an Imperial Commissioner, and has a few little stations along the coast.<sup>3</sup> In most cases annexation comes first and settlement follows, but this order is sometimes

<sup>1</sup> *London Times* of Dec. 23, 1884; *Annual Register for 1884*, pp. 432-434.

<sup>2</sup> *Droit des Gens*, I., § 207.

<sup>3</sup> *Statesman's Year Book*, 1894, pp. 239 and 569.

reversed. A state occasionally annexes unoccupied territory because a little group of its subjects have gone there to trade, and a settlement has been formed which it deems desirable to place under its authority and protection. The mere fact of settlement, like the mere fact of annexation, will not give sovereign rights while it stands alone. It does not matter which of the two comes first, but they must coexist in order to make a valid occupation. Moreover, it is necessary, that the hold upon the territory should be maintained continuously, or at the least that any cessation of control should be temporary and intermittent. A territory once occupied can be abandoned, as the British abandoned the island of Santa Lucia in 1640, after their settlers had been massacred by the Caribs. And when such an abandonment has been shown by lapse of time, or in any other way, to be definite, another state is at liberty to treat the territory as again in the condition of a *res nullius* and occupy it, as the French occupied Santa Lucia in 1650. But the case of Delagoa Bay seems to prove, that a temporary lapse of control over territory will not be sufficient to invalidate a claim based upon the exercise for centuries of more or less continuous authority. The territory in question was claimed by England and Portugal, and the dispute between them was referred to the arbitration of Marshal MacMahon, then President of the French Republic. His decision in 1875 in favor of Portugal was based upon the ground we have indicated.<sup>1</sup>

#### § 94.

It is admitted on all hands that the rights of sovereignty gained by occupation extend beyond the territory inhabited and used by the original settlers or commanded by the guns of their forts. What is needed for their security and to afford room for the possible expansion of their settlements in the not too distant future

Extent of territory  
gained by  
occupation.

<sup>1</sup> Hall, *International Law*, § 34; Pitt Cobbett, *Leading Cases in International Law*, pp. 262-263.

should be added. But the reasonable doctrine of expansion must not be pushed to absurd lengths. A state which has established one or two posts on a small portion of the coast of a vast continent cannot found thereon a claim to exercise sovereign power over the whole of it, and exclude the colonies of other states, on the ground that after the lapse of many centuries her own settlers may overspread it, if all goes well with them. The questions connected with occupation which have proved in practice to be the most fruitful sources of controversy and war have been boundary disputes. States have been unable to agree as to how much territory was acquired by an act or series of acts of annexation and settlement, and the Roman Law from which the rules of occupancy were originally derived gave little help towards the solution of these difficulties. But a few principles and precepts, some positive and some negative, may be evolved from their history.

The whole of an island, unless it be a very large one, and even a group of very small islands, may be acquired by one act of annexation and one settlement. Thus, in 1885, Great Britain and Germany took possession of the Louisiade Archipelago and the Marshall Islands respectively. Both groups are situated off the eastern end of New Guinea, and were taken in consequence of the acquisitions made on that island. In each case one formal act of annexation was held to be sufficient for the entire group.<sup>1</sup> The rules that apply to continents will apply to islands of vast extent like Australia, which is often called a continent. It belongs to the Empire of Great Britain, because a large number of British settlements fringe its coasts and run far up into the interior. But there can be no doubt that if other powers had colonized there a hundred years ago, when England's sole settlement was at Botany Bay, they would have been entitled to divide with her the vast territories that are now hers exclusively by a perfectly valid title.

A state cannot acquire a whole continent by establishing

<sup>1</sup> *Annual Register for 1884*, pp. 433, 434.

a few settlements upon one of its coasts and going through the formal ceremony of annexation, nor can the colonization of one shore or a part of one shore of a continent give a title right across it to the opposite coast. These statements are mere negations; but, nevertheless, they enunciate a very important principle, and one which was not at first recognized by the colonizing nations of Europe. Spain and France vied with one another in the magnitude of the pretensions they based upon isolated acts of discovery, annexation and settlement, and some of the charters given by the kings of England to the early British colonists in America expressly granted territorial rights across the continent to the Pacific Ocean. But when these documents were referred to by the American Commissioners at the Conference held in London in 1826-1827 on the Oregon boundary question, the British negotiators declared that they had no international validity and could give to the grantees no more than an exclusive title against their fellow-subjects.<sup>1</sup> This was undoubtedly a correct statement. Modern International Law lends no sanction to such preposterous claims.

Occupation of a considerable extent of coast gives a title up to the watershed of the rivers which enter the sea along the occupied line; but settlement at the mouth of a river does not give a title to all the territory drained by that river. Water is appurtenant to land, not land to water. If a coastline is effectively occupied, the rivers which fall into the sea throughout its extent, and the country drained by them, are held to belong in full sovereignty to the power whose settlements are dotted along the shore. This rule provides room for reasonable extension inland, but gives no countenance to the limitless pretensions of which we have just spoken. It is nowhere better set forth than in the words of Messrs. Monroe and Pinckney, the American negotiators at Madrid in the controversy of 1803-1805 about the boundaries of Louisiana. They declared that "When any European nation

<sup>1</sup> Twiss, *Law of Nations*, I., § 126.

takes possession of any extent of sea-coast, that possession is understood as extending into the interior country to the sources of the rivers emptying within that coast, to all their branches and the country they cover." This doctrine they described as "dictated by reason" and "adopted in practice by European nations." It is generally accepted as good in law; and, as Sir Travers Twiss points out,<sup>1</sup> is inconsistent with the claim to the whole territory drained by the Columbia River, put forth by Mr. Gallatin on behalf of the United States in 1827, on the ground of first discovery of the mouth of the river, and the subsequent erection of a trading-post close to it. This claim was never allowed; and when the Treaty of 1846 closed the controversy, it gave to Great Britain the upper waters of the Columbia River and the country through which they flow.<sup>2</sup>

In the absence of natural features the boundary of the contiguous settlements of two states along the same coast should be drawn midway between the last posts on either side. The boundary line between the possessions of the United States and Spain on the Gulf of Mexico was finally drawn in accordance with this principle.<sup>3</sup> But there can be no doubt that natural boundaries would be preferred to an imaginary line in cases where they exist. If a navigable river falls into the sea between settlements made by one nation and settlements made by another, each would be deemed to have occupied up to the bank on its side of the river, and the boundary line between them would be drawn down the middle of the channel.

### § 95.

The rules just enunciated close the door to many disputes, but all of them are not so precise in their terms as to be incapable of diverse interpretations when applied to concrete cases. Moreover, it is conceivable that a state might contest the applicability of

Recent developments of the doctrines of occupation as applied to Africa.

<sup>1</sup> *Law of Nations*, I., §§ 125, 126.

<sup>2</sup> *Treaties of the United States*, p. 436.

<sup>3</sup> *Ibid.*, p. 1017; Hall, *International Law*, § 87.

some of them to Africa, since they are derived chiefly from American experience, and the two continents are not alike either in geographical features or in political circumstances. Considerations such as these have prompted the great European states who have engaged in the recent competition for territory and influence in Africa to enter into agreements among themselves with a view to avoiding future conflicts. These have taken the form of treaties for the delimitation of what are called Spheres of Influence.<sup>1</sup> Each of the contracting parties is free to acquire territory by occupation and perform any act of sovereignty without interference from the other within the territory thus assigned to it by international agreement. The chief of these agreements are those entered into with regard to East Africa and Southwest Africa between Great Britain and Germany in July, 1890, with regard to West Africa between Great Britain and France in August, 1890, and Great Britain and Germany in November, 1893, and with regard to South Africa between Great Britain and Portugal in June, 1891. There are also agreements, concluded in 1886, between Portugal and France, and Portugal and Germany, and one between Great Britain and Italy concluded in 1891.<sup>2</sup> Moreover, the boundaries of the Congo Free State are defined by a number of conventions, and its rulers have liberty of acquisition within the limits therein marked out. Thus each of the great colonizing nations has obtained a free hand over very wide tracts of country, and the possibility of such struggles between them as took place on the American continent is reduced to a minimum. It is not, of course, altogether destroyed; for the powers who are not parties to the agreements in question, and do not accord recognition to them, are in no way bound by their provisions, and retain the right under the common law of nations to occupy any territory which is technically *res nullius*. But the danger of future collision is very small, since every state anxious to participate in the division of Africa is already supplied with

<sup>1</sup> See § 103.

<sup>2</sup> The list in the text is not complete. There have been several agreements since 1891.

more territory than it can reduce into possession for a large number of years. And an agreement embodied in the Final Act of the West African Conference of 1885, which was signed by all the powers of Europe and also by the United States, contained provisions which will tend to remove difficulties arising out of conflicting claims to the same territory. Each of the signatory powers bound itself to send a formal notification to the others whenever for the future it acquired by occupation a tract of land on the coast of Africa or assumed a Protectorate there. This rule has been already acted upon in several instances, and it is much to be wished that all states would adopt it and extend it to their future acquisitions of unoccupied land. The powers represented at the West African Conference agreed, further, that the appropriating state must keep reasonable order throughout the territory occupied by it on the coasts of the African continent, so as to ensure freedom of trade and transit, and protect existing rights.<sup>1</sup> This provision too could with great advantage be turned into a general rule of International Law.

### § 96.

It is impossible to study the history of recent territorial acquisitions in Africa and elsewhere without being struck by the simultaneous presence of two things which at first sight appear incompatible. We find, on the one hand, in treaties and diplomatic documents little or no reference to the existence of native inhabitants. The countries they live in are partitioned without the slightest regard to their wishes. They are not deemed to possess any rights. They are simply ignored as having no *locus standi* in the matter. On the other hand, we discover that when the states who, in their mutual agreements, pay no attention to the natives come to deal singly and directly with new territory which they wish to acquire, they are

The native tribes in occupied territories should be treated with justice and trained in civilization.

<sup>1</sup> British State Papers, *Africa*, No. 4 (1885), p. 312.



careful to make treaties with the inhabitants, and as a rule do not take over the country of a tribe without some agreement with it. For instance, about three hundred treaties have been concluded with native states and tribes in respect of the British territories in the basin of the river Niger.<sup>1</sup> This seeming inconsistency is explained when we reflect that International Law, as a technical system of rules for determining the actions of states in their mutual relations, is concerned with civilized communities alone. Occupation gives a valid title under it; but the title can be valid only as between the states who are subjects of the law. When such states come to deal with native tribes, though the technical rules of International Law do not apply, moral considerations do. Justice demands that the inhabitants of occupied districts be treated with fairness. The old idea that non-Christian peoples could be lawfully dispossessed, and even slain, outraged the conscience of Christendom, and has been long ago consigned to the limbo of forgotten theories. The sophistries whereby Vattel<sup>2</sup> sought to justify the acquisition of the lands of nomads, on the ground that they took up more territory than they had occasion for if they would live industrious and agricultural lives, would have but little weight to-day. There is a strong feeling abroad that native races ought not to be exploited. Self-respecting states are held bound to treat them with justice and humanity. How far this theory is reconcilable with the practice of acquiring sovereignty over them, and sending white men to live and trade and farm and mine among them on the strength of concessions obtained from their chiefs, is a very difficult question to answer. In some instances civilized rule has increased the number and happiness of native races and is gradually educating them in all the arts of life. In others, tribes have withered up before the impact of the white man like grass before a prairie fire. It is impossible to lay down general rules to cover all cases,

<sup>1</sup> *Statesman's Year Book for 1894*, p. 190. The validity of some of these treaties is now (1897) in dispute between Great Britain and France.

<sup>2</sup> *Droit des Gens*, I., § 209.

and in a work like the present we cannot enter into details. Of one thing we may be sure, that when representatives of superior and inferior races come into contact, the former must prevail. They are often asked to rule by tribes who feel the need of their protection. But they should never inaugurate their authority by acts of cruelty or bad faith, and should govern in a paternal, not a tyrannical, manner. The advantage of their subjects should be their object rather than their own profit; and their ultimate aim should be to educate their wards so that they may in time learn to govern themselves.

### § 97.

Among the titles it is possible to obtain through the transfer of territories already in the possession of civilized states, the most important is

#### *Title by cession.*

Cession is the formal handing over by agreement of territorial possessions from one state to another. The agreement is embodied in a treaty which usually contains stipulations as to the transfer along with the ceded district of a proportionate share of the public debt of the ceding state. Moreover, questions connected with the rights of citizenship of its inhabitants and rights over the state domains within it are usually settled in the treaty; but no general rule can be laid down as to these matters. The stipulations respecting them will vary with the circumstances of each case.

Legal modes of  
acquiring territory.  
(3) Cession.

Since cession is the usual method whereby changes are effected in the distribution of territory among states which are subjects of International Law, it follows that cessions may take place in consequence of transactions of various kinds. Of these we will consider first *Sale*. It is not very frequent; but cases of it are to be found even in modern times, as when in 1867 the United States purchased Russian America for 7,200,000 dollars.<sup>1</sup> The next ground of cession is *Gift*.

<sup>1</sup> *Treaties of the United States*, p. 939.

Free gifts of territory are not altogether unknown, though as a rule the intercourse of states is not conducted on principles of lavish generosity. Yet a government that desired for special purposes to retain another's good-will has been known to make a gift of territory by treaty of cession. Thus in 1762 France ceded to Spain the colony of Louisiana, in order to indemnify her for the loss of Florida, which had been transferred to England by the Treaty of Paris;<sup>1</sup> and in 1850 Great Britain ceded to the United States a portion of the Horse-shoe Reef in Lake Erie, in order that the government of Washington might erect a lighthouse thereon.<sup>2</sup> But in matters of transfer of territory the gift is far more often forced than free. A state beaten in a war is sometimes obliged to make over a province or a colony to the victor as one of the conditions of peace. Indeed, most cessions are the results of warfare and come under the head of forced gifts. One of the most recent instances is to be found in the cession of Alsace and part of Lorraine by France to Germany. This was done by the Treaty of Frankfort of 1871,<sup>3</sup> and was one of the results of the defeat and downfall of France in the war of that and the preceding year. The last ground of cession we will mention is *Exchange*. It was common enough in times when territories were cut and carved in order to make provision for the scions of ruling families, but the growth of the principle that populations should have a voice in the settlement of their political destiny has made it comparatively rare. We can, however, find one instance in recent European history. By the Treaty of Berlin of 1878 Roumania ceded to Russia that portion of Bessarabia given to it at Russia's expense in the Treaty of Paris of 1856, and received in exchange the Dobroutcha, which was taken from Turkey.<sup>4</sup>

<sup>1</sup> Wheaton, *History of the Law of Nations*, Pt. II., § 3; C. de Martens, *Recueil*, I., 29-36; Phillimore, *Commentaries*, Pt. III., Ch. xiv.

<sup>2</sup> *Treaties of the United States*, p. 444.

<sup>3</sup> Hertslet, *Map of Europe by Treaty*, III., 1955.

<sup>4</sup> Holland, *European Concert in the Eastern Question*, p. 302.

## § 98.

Our next task is to explain the nature of

*Title by conquest.*

It is necessary to begin by distinguishing conquest in the legal sense from conquest in the military sense. The latter takes place when the agents of one belligerent state drive the agents of the other out of a territory and hold it by military force. The former is brought about when the victorious state exercises continuously all the powers of sovereignty over a territory conquered in a military sense, and signifies by some formal act, such as a diplomatic circular or a proclamation of annexation, its intention of adding that territory to its dominions. The question of what constitutes a valid conquest in the legal sense was fully discussed after the downfall of Napoleon in connection with certain annexations of his in Germany and Italy. The most famous of these cases was that of Hesse Cassel; and it seems to be generally admitted in respect of it that the French Emperor had acquired the Electorate by conquest so as to give international validity to acts done in the capacity of its sovereign. His troops had overrun it in 1806, and he had acted as supreme ruler for some time, and had then added the territory to the Kingdom of Westphalia, which he created for his brother Jerome, and which was recognized by many powers and lasted till 1813.<sup>1</sup> Title by conquest differs from title by cession in that the transfer of the territory is not effected by treaty, and from title by prescription in that there is a definite act or series of acts, out of which the title arises. These acts are successful military operations; but if a province conquered in a war is afterwards made over to the victorious power by treaty, it is acquired by cession. Title by conquest arises only when no formal international

Legal modes of  
acquiring territory.  
(8) Conquest.

<sup>1</sup> Phillimore, *Commentaries*, Pt. XII., Ch. vi.

document transfers the territory to its new possessor. Title by prescription arises only when no fact but long-continued possession can be alleged as a foundation for the existence of sovereign rights.

### § 99.

In spite of denials of the validity of

#### *Title by prescription*

by some writers,<sup>1</sup> who lay themselves open to the imputation of mistaking their own theories of what is just and fitting for the public law of the civilized world, there can be no doubt that long-continued possession of Legal modes of acquiring territory.  
(4) Prescription. territory gives a good title to it in International Law when no other ground can be clearly shown, and even in cases where possession was originally acquired by illegal and wrongful acts. It is difficult to see what other title the older states of Europe could put forward to the lands on which their people have been settled from time immemorial. The same reasons which justify, and even compel, the recognition of prescription as a valid ground of title to private property by the municipal law of all civilized peoples, support its admission into International Law. It is as necessary to put a limit to disputes about national ownership as it is to close legal controversies between individuals. The only distinction between the two cases arises from the absence of a common superior over states. There being no central authority to make and enforce rules, the length of time requisite to give a title by prescription cannot be exactly defined, as it is in municipal law. But nevertheless the principle is undoubted, and a power which should refuse to recognize it would soon be put under ban as a wanton disturber of the general peace.

<sup>1</sup> e.g. G. F. de Martens, *Précis*, §§ 70, 71.

## § 100.

It now remains for us to consider

*Title by accretion.*

This applies only to water-boundaries; and the rules which define and limit it are taken with little variation from Roman

Legal modes of acquiring territory.  
(b) Accretion.

Law.<sup>1</sup> When the action of water adds to the land, or when islands are formed off the coast of a state, whether by *alluvium* or from any other cause, they are regarded as portions of the territory. When a waterway is the boundary between two states, islands formed on either side of the middle of the channel belong to the state which owns that side. If they arise in the central channel itself, they are divided between the two states by a line drawn across or along them in continuation of the line drawn down the middle of the channel. But if a convulsion of nature alters altogether the bed of a boundary river or lake, the line of demarkation does not follow the new bed of the stream, but runs along the bottom of the old deserted channel. There are provisions for exceptions to these rules when, instead of the river itself being the boundary, a fixed line is drawn which happens to touch the river and run along it; but the whole subject is so far removed from the practical everyday life of states, and cases in point are so seldom likely to occur, that it does not seem desirable to occupy space by pursuing the matter into further detail.

## § 101.

We now pass on to consider the different degrees of power exercised by states over territory which is to a greater or less

A state may exercise power over territory as (a) a part of its dominions.

extent under their authority or influence. It is necessary to deal with this matter because, in quite recent times some of the leading maritime and colonizing states have begun to reserve for themselves

<sup>1</sup> Justinian, *Institutes*, II., i., 20-24, and *Digest*, XLI., i., 7, 29, 65.

territories over which they do not for the present exercise full rights of sovereignty; and in consequence, questions have arisen as to the exact nature and limits of the powers possessed by them over such territories. The desire to partition Africa, and the transactions that have taken place in order to secure its peaceful gratification, have forced these questions to the front, if they have not created the problems that are now awaiting solution with regard to them. Modern International Law was familiar with sovereignty, and it knew of suzerainty, though rather as a relation between governments than as a power over territory. The few protectorates of which it was cognizant afforded little scope for the development of international difficulties. Now, however, all is changed. Within the last few years protectorates have sprung up in Africa with the rapidity of tropical vegetation, and questions connected with the responsibilities and mutual duties of the protecting powers have sprung up with them. The creation of spheres of influence has gone on apace; but the name and the thing signified by it are so new, that jurists have not yet come to an agreement as to its exact meaning. In fact, a new chapter is being added to International Law; and in the remarks that follow we can do little more than indicate the direction taken by opinion and practice with regard to the matters in question.

There can be no doubt or difficulty in respect of the territory over which a state exercises authority as *a part of its dominions*. Whether such territory has been possessed from time immemorial or acquired but yesterday, whether it is full of evidences of the most advanced civilization or covered by forest and wilderness, whether the bulk of its people are cultivated and polite or rude and barbarous, the powers exercised over it, and all who dwell upon it, are those of full sovereignty. The state which owns it, controls entirely and exclusively both its internal and its external affairs, except in those few cases where, as we have seen before,<sup>1</sup> some of the powers of

<sup>1</sup> See §§ 48-50 and 71-73.

external sovereignty are temporarily or permanently impaired. Its rights and obligations are defined by the common law of nations, and may be known by those who take the trouble to inquire.

### § 102.

With regard to *protectorates* there is much more complexity. They have lately been proclaimed in abundance over territories occupied by savage or semi-barbarous tribes. Generally the inhabitants have some political organization of their own, capable of performing the rudimentary functions of government. In that case the protecting power exercises full control over all external affairs, and leaves internal matters in a greater or less degree to the native administration. But, as Hall well points out,<sup>1</sup> its exercise of the powers of external sovereignty involves it in responsibilities to other civilized states. If any wrongs are committed upon their subjects by the people of the protectorate, they must not seek redress direct from the native rulers or exact it by force; but it is their duty to apply to the government of the protecting state. That government must, therefore, have some authority in internal matters, sufficient at the least to enable it to protect the subjects of other civilized powers from wanton injury to persons or property. It is true, that the West African Conference of 1884-1885 declined to extend to protectorates the obligation to keep reasonable order within the territory which it imposed upon its members in respect of their future occupations on the coast of Africa.<sup>2</sup> But the hard facts of international intercourse cannot be altered by protocols; and it is as certain as anything can be that if, for instance, a German subject were injured and despoiled in the British protectorate of Zanzibar, Germany would apply to Great Britain for redress. Indeed one of the first acts performed by Great Britain, when

A state may  
exercise power  
over territory as  
(b) a protectorate.

<sup>1</sup> *International Law*, § 38\*.

<sup>2</sup> British State Papers, *Africa*, No. 4 (1885), pp. 215, 312.



she acquired a protectorate over the neighboring territory of Witu, in consequence of her agreement with Germany in the summer of 1890,<sup>1</sup> was to send a ship of war to bombard the place in chastisement for an attack on a German trading party and the slaughter of some of its members. Moreover, it sometimes happens that a civilized state, partly from the desire of acquiring full authority and partly from a laudable wish to educate the natives in civilization, takes care to obtain the right to exercise very considerable powers of internal sovereignty within a territory it receives under its protectorate. Thus Great Britain levies a hut-tax in Zululand, and provides for the administration of justice, and she patrols the protected portion of Bechuanaland by a force of border police.<sup>2</sup> These instances show that it is impossible to define a protectorate as a political arrangement, whereby the powers of external sovereignty are assumed by the protecting state, while the protected community retains the powers of internal sovereignty. There may be a few protectorates of which this account is true, though it is difficult to see how the separation of the functions of government into two well-defined classes can be made compatible with the responsibilities of the protecting power to other states. But in the great majority of cases domestic affairs are placed to some extent under the control of the authority which deals with external relations. How far that control shall extend, and how much power should be left in the hands of the native governments, are matters which vary from instance to instance and from time to time. The protecting state requires of other members of the family of nations abstention from any direct political dealings with the inhabitants of the protectorate, and holds them bound not to make any attempt to acquire the protected territory. On the other hand, it is under an obligation to restrain those whom it protects from committing injuries upon the subjects of other states or performing hostile acts against

<sup>1</sup> British State Papers, *Africa*, No. 6 (1890), p. 10.

<sup>2</sup> *Statesman's Year Book* (1894), pp. 168, 202.

neighboring peoples ; and for these purposes it must have larger powers of control than are contained in the management of foreign relations. It may use the native authorities, or it may employ agents of its own ; but it must in some way obtain the means necessary for the fulfilment of its international obligations. At present it is almost impossible to say with certainty how far they extend. It is tolerably clear, that if a state were involved in war, its protectorates would be liable to attack from its foes, in the absence of any special agreement to the contrary, such as those contemplated by the Eleventh Article of the Final Act of the West African Conference, which bound the contracting parties to use their good offices, in order that territories and protectorates comprised in the free-trade zone created by the Act, should be exempt from warlike operations when the powers exercising the rights of sovereignty or protection over them were engaged in hostilities.<sup>1</sup> It is hardly too much to say that there is a tendency to regard the peoples of protected districts as subjects of the protecting state for international purposes ; but time alone can show whether a rule to this effect will be embodied in International Law. Should it be adopted, a protectorate would for international purposes differ in no respect from an ordinary province or colony.

### § 103.

A *sphere of influence* is a new thing in formal international relations. The phrase was not heard of till a few years ago, and it can hardly be said to possess a clear and generally recognized technical meaning even yet. Nevertheless, the facts it denotes are not so difficult to understand as those we have attempted to analyze in our explanation of the meaning of a protectorate. Over territory included in the sphere of influence of a state it does not necessarily exercise any direct control, either in external or in internal affairs ; but it claims that other states

A state may exercise power over territory as (o) a sphere of influence.

<sup>1</sup> British State Papers, *Africa*, No. 4 (1885), p. 307.

shall not acquire dominion or establish protectorates therein, whereas it is free to do so if it chooses. The territories actually reserved up to the present as spheres of influence are, in the main, unoccupied; but they contain many settlements made by traders and missionaries, several protectorates, and a few districts already annexed to the dominions of the state in whose sphere they are placed. With regard to these last and to the protectorates, the exclusive rights of the possessory or protecting power exist independently of any agreement as to the area within which it may operate without hindrance. They rest upon the common law of nations, and are not made stronger by treaty stipulations. But the rest of the areas contained in modern spheres of influence are reserved by agreement, and by agreement only. When Great Britain and Germany covenanted with each other, that "one power will not in the sphere of the other make acquisitions, conclude treaties, accept sovereign rights or protectorates, nor hinder the extension of influence of the other,"<sup>1</sup> each contracted itself out of its common law right of occupying any unappropriated and uncivilized territory it desired to take, and received in return the assurance that within the limits assigned to it the expansive activity of the other would not be exercised. Such an agreement cannot bind the civilized world unless it is specially recognized by the other members of the family of nations. Its immediate legal effect is confined to the powers which signed it. It is, however, hardly likely that any government would venture to risk the certain hostility of one, and perhaps both of them, by attempting to extend its dominions within the sphere of either. Should war break out on other grounds, doubtless a belligerent would strike at its adversary, there as well as elsewhere, if opportunity offered; but there is little fear that the territories reserved to one another in Africa by Great Britain, Germany, France, Italy and Portugal will be the cause of war in the immediate future. Each power will have enough to do for many years, if it attempts to reduce

<sup>1</sup> British State Papers, *Africa*, No. 6 (1890), p. 8.

into effective possession the vast tracts assigned to it. Often the first step in the process of acquisition is the establishment of a protectorate. This being accomplished, the authority of the protecting power over the protected district tends constantly to increase, till at last nothing but the shadow of internal sovereignty is left to the native rulers. When such a point is reached, annexation cannot be far off; and as soon as it takes place the territory has become part of the colonial dominions of the annexing country. Protectorates over savage or semi-barbarous races are, as a rule, but temporary resting-places on the road to complete incorporation.

#### § 104.

Great Britain and Germany have adopted the policy of allowing chartered companies to do pioneer work in territories

Chartered  
companies and  
spheres of  
influence.

which they have not taken by occupation, but which have been included in their spheres of influence. Often the chartered company began its work before the diplomatists stepped in to delimit the territories reserved for their respective countries. We have already endeavored to fix the position of these companies in International Law.<sup>1</sup> It will be sufficient to add here that the control exercised over them by the mother-country can hardly be very real or very continuous; and that in her effort to escape responsibility by throwing it upon the shoulders of an association, she may often involve herself in transactions more dubious in character and more burdensome in execution than would have been possible had her control been direct. For instance, when in 1889 the natives of the German sphere of influence in East Africa rose and attacked the stations of the German East Africa Company, the Imperial Government sent ships and men to assist in putting down the outbreak.<sup>2</sup> It would have been impossible for it to have looked calmly on, while its subjects were being slaughtered by the natives; yet, had the administration of the district

<sup>1</sup> See § 54.

<sup>2</sup> *Annual Register* (1889), pp. 301-304.

been in its hands, it should probably have avoided the high-handed measures on the part of the company's agents which were largely responsible for the rising. The recent history of the native Kingdom of Uganda, in British East Africa, is another case in point. Under the régime of the British East Africa Company passions, political and religious, seem to have been aroused, which it proved entirely unable to restrain. The British Government has been obliged to send agents of its own into the country, and assume a large control over its affairs in order to restore peace,<sup>1</sup> and in April, 1894, it resolved to establish a protectorate. Responsibilities it did not seek, but wished to avoid, have been thrust upon it. Its hands have been forced, and forced in consequence of the very device which was to extend the trade and influence of England without involving it in state efforts and state obligations. It is impossible for a government to grant to associations of its subjects powers which are hardly distinguishable from those of sovereignty, without sooner or later becoming involved in their proceedings, as in 1893 the British Government became involved, much against its will, in the war waged by the British South Africa Company against the Matabele and their chief, Lobengula.<sup>2</sup> There is doubtless much fascination in the idea of opening up new territories to the commercial and political influence of a country, and at the same time adding nothing to its financial burdens or international obligations. But experience shows that the glamour soon wears off, and the state which seeks to obtain power without responsibility obtains instead responsibility without power.<sup>3</sup>

### § 105.

We must now turn our attention to territorial rights over

<sup>1</sup> *Annual Register* (1892), pp. 342-345.

<sup>2</sup> *Statesman's Year Book for 1894*, p. 195.

<sup>3</sup> The argument in the text has been greatly strengthened by events which have taken place since it was written. The lawless and unauthorized raid of a portion of the forces of the British South Africa Company into the territory of the Transvaal Republic in December, 1895, has involved the British Government in a maze of colonial and international complications from which it has not yet (November, 1897) emerged.

waters, and the claims of states to exercise sovereign authority in connection therewith. It was impossible to deal with these questions when we were discussing the limits of territorial possession; and they were reserved for consideration after we had investigated the subject of international title. The interest of some of them is chiefly historical, while others are matters of importance in our own day. We shall, however, be better prepared to grapple with the latter if we have some knowledge of the former.

Rights over waters.  
(1) Claims to  
sovereignty over  
the high seas.

We will take first the subject of

*Claims to sovereignty over the high seas.*

Originally the sea was perfectly free, though, as Sir Henry Maine justly says, it was common to all "only in the sense of being universally open to depredation."<sup>1</sup> In Roman Law it was one of those *res communes* that were incapable of occupation.<sup>2</sup> But in the Middle Ages the maritime powers of Europe claimed to exercise territorial sovereignty over those portions of the high seas which were adjacent to their land territory or otherwise in some degree under their control. Thus Venice claimed the Adriatic, Denmark and Sweden declared that they held the Baltic in joint sovereignty, and England asserted a claim to dominion over the seas which surround her shores from Stadland in Norway to Cape Finisterre in Spain, and even as far as the coast of America and the unknown regions of the North.<sup>3</sup> Denmark put in a counter-claim to the Arctic seas, and especially to a large zone round Iceland where there were valuable fisheries. These claims, monstrous as they seem to us, were by no means an unmixed evil in mediæval times, when piracy was a flourishing trade, and pirate vessels were strong enough to insult the coasts of civilized powers and make captures in their harbors. The state which claimed to possess a sea was held bound to "keep" it, — that is, to perform police duties within it, — and

<sup>1</sup> *International Law*, p. 76.

<sup>2</sup> Justinian, *Institutes*, II., i., 1.

<sup>3</sup> Selden, *Mare Clausum*, II., i.

this obligation was fulfilled with more or less completeness by England and other maritime powers. Moreover, the claim to dominion was not deemed to carry with it a right to exclude the vessels of other nations from the waters in question. Tolls were often levied to provide the funds for putting down piracy and keeping the peace of the seas, and licenses to fish were given to foreigners on consideration of a money payment. In fact, no serious grievance appears to have been felt till after the discovery of America. That event gave a great impetus to trade and navigation, and at the same time excited a strong desire on the part of the Spaniards to be the sole possessors of the wealth of the New World. Accordingly, they not only claimed the Pacific Ocean as their own by right of discovery, but also strove to exclude from it the vessels of other powers. About the same time Portugal adopted a similar policy with regard to the Indian Ocean and the newly discovered route round the Cape of Good Hope. The other maritime nations set at naught these preposterous claims. French and English explorers traded, fought and colonized in America with scant respect for the so-called rights of Spain, and Holland sent her fleets to the Spice Islands of the East without troubling to ask leave and license of Portugal. The rulers and jurists of these aggressive nations sought a theoretical justification of their acts in the new doctrine, or rather the old doctrine revived, that the sea was incapable of appropriation. Elizabeth of England told the Spanish Ambassador at her Court that no people could acquire a title to the ocean, but its use was common to all. Grotius of Holland published a learned argument in favor of its freedom in 1609. His book was entitled *Mare Apertum*, and in it he elaborated the old principle of Roman Law, that the sea was incapable of occupation. He afterwards modified his views so far as to allow that gulfs and marginal waters might be reduced into ownership as attendant upon the land;<sup>1</sup> and in this latter form the principle of the freedom

<sup>1</sup> *De Jurt Belli ac Pacis*, II., iii., 8.

of the seas from territorial sovereignty became one of the fundamental doctrines of modern International Law. Selden in his *Mare Clausum*, published in 1635, supported the claim of England to dominion over the northern seas, but rather on the ground of immemorial prescription than on general principles. Even then the enforcement of such claims was against the spirit of the age, and they began to dwindle from the middle of the seventeenth century. For more than a hundred years after Great Britain had ceased to exercise any real powers of sovereignty over the seas she still called her own, she claimed within their limits ceremonial honors to her flag; and till quite recent times Denmark endeavored to reserve a large area round the coast of Iceland for the exclusive use of her fishermen. But the British demand for salutes and the lowering of the flag has been tacitly dropped for generations, and Denmark, after various concessions, gave up the struggle in 1872 and fell back on the three-mile limit allowed by International Law.<sup>1</sup>

### § 106.

The last attempt to enforce exclusive claims over a portion of the open ocean was made by the United States in the controversy with Great Britain which terminated in the Bering Sea arbitration of 1893. In the year 1821 the Emperor Alexander I. of Russia issued an ukase, prohibiting all foreign vessels from approaching within less than a hundred Italian miles of the coasts and islands belonging to Russian America. This proceeding was justified on the ground that Russia had a right to claim the Pacific north of latitude 51° as a *mare clausum*, on the ground of first discovery and the possession of both its shores. Great Britain and the United States at once protested against the ukase and the claims on which it was founded, the American Secretary of State, Mr. John Quincy Adams,

Rights over waters.  
(2) The American  
claim to prohibit  
seal-fishing in  
Bering Sea.

<sup>1</sup> Hall, *International Law*, § 40, note.



pointing out that the distance across the Pacific from shore to shore along the 51st parallel of north latitude was no less than 4000 miles. He declared that the United States could not admit the existence of an "exclusive territorial jurisdiction" over these waters on the part of Russia, and that they would "maintain the right of their citizens . . . of free trade with the original nations of the northwest coast throughout its whole extent."<sup>1</sup> He claimed for them freedom from molestation "beyond the ordinary distance to which the territorial jurisdiction extends."<sup>2</sup> The Russian Government yielded to the remonstrance of the two great commercial powers, and signed a convention with the United States in 1824<sup>3</sup> and with Great Britain in the following year.<sup>4</sup> The terms of these instruments were almost identical. They conceded to citizens and subjects of both powers the right to navigate and fish without molestation in the waters closed to them by the ukase of 1821, and to resort to places on the coast where there was no Russian settlement for the purpose of trading with the natives. Some temporary provisions in the American treaty with regard "to gulfs, harbors, and creeks" were differently interpreted by the two powers, and were not renewed; but the main stipulations remained in force till the United States acquired the whole of Russian America by purchase in 1867. A rapid development of the country then begun, and among other enterprises the seal-fisheries were taken in hand with a view to their improvement. In 1870 a monopoly of the Pribyloff seal-rookeries was given by the American Government to the Alaska Commercial Company,<sup>5</sup> on condition that it paid certain sums annually to the United States Treasury, and killed no seals except on the islands, and not more than 100,000 a year even

<sup>1</sup> *Treaties of the United States*, p. 1379.

<sup>2</sup> *British and Foreign State Papers*, IX., 483.

<sup>3</sup> *Treaties of the United States*, p. 931.

<sup>4</sup> Wheaton, *International Law*, § 170.

<sup>5</sup> Wharton, *International Law of the United States*, II., 272.

there. The sealing industry soon became exceedingly lucrative, and vessels from the maritime provinces of the Dominion of Canada were attracted to it. Their crews, not being bound by the restraints imposed by the law of the United States upon American citizens, killed the seals wherever they could find them outside the ordinary limits of territorial waters. The American sealers complained and protested; and in 1886 three schooners belonging to Victoria, British Columbia, were seized while fishing about seventy miles from land, and taken before the District Court of Sitka for trial on a charge of infringing the law which forbade the killing of fur-seals within the limits of Alaska and its waters, except under authorization from the Secretary of the United States Treasury. The judge who tried the case laid down in his charge to the jury that the territorial waters of Alaska included the whole of the vast area—1500 miles in width and 700 miles in depth—bounded by the limits mentioned in the treaty of cession of 1867 as those “within which the territories and dominions conveyed are contained.”<sup>1</sup> Thus directed, the jury found the prisoners guilty, and the penalties of imprisonment for themselves and confiscation for their vessels and cargoes were enforced against them. Great Britain at once remonstrated. The seizure of other vessels elevated the difficulty to the rank of a great international controversy, which was carried on for several years and threatened more than once to disturb the peaceful relations between the two countries. Happily, however, it was referred to the arbitration of a board of seven jurists, two being appointed by each of the parties to the controversy, one by the President of the French Republic, one by the King of Italy, and one by the King of Sweden and Norway.<sup>2</sup> The award of this tribunal was given at Paris, on August the 15th,

<sup>1</sup> *Treaties of the United States*, p. 940; *British State Papers, Correspondence respecting the Behring Sea Seal-fisheries, 1886-1890*, p. 2.

<sup>2</sup> *Message of President Harrison transmitting Treaty of Arbitration of February 9, 1892, to the Senate, March 8, 1892.*

1893. The arbitrators found for Great Britain on all the points of International Law in dispute.<sup>1</sup> They agreed that by the treaty of 1867 Russia ceded to the United States all her rights within the boundaries therein defined; but they held that the jurisdiction over enormous tracts of open ocean claimed by Alexander I. in 1821 was not among those rights. International Law never gave it to Russia, and she could not cede what she did not possess. Accordingly, the territorial rights of the United States in the waters of Alaska were limited to its bays and gulfs and the marine league along its shores. They had no property in the fur-seals when found outside these limits, and no power to protect them from seizure on the high seas by the citizens of other countries. At the same time, the tribunal recognized the force of the American contention, that it was necessary to put the fishery under regulations in order to preserve the seal-herd from grievous diminution, if not utter destruction. The treaty of reference gave the arbitrators power to devise such regulations, in case they declared Bering Sea open to the fishing-vessels of all nations. They exercised this power, and drew up an elaborate code, which established a close time for seals, forbade their capture within sixty miles of the Pribyloff Islands, decreed that only sailing vessels should engage in the fishery, and laid down many other rules which the two powers brought into effect by means of domestic legislation in 1894.

It can hardly be doubted that the decision of the arbitrators was good in International Law. The claim to exercise rights of sovereignty over Bering Sea was contrary to principles which had been asserted by no power more vigorously than the United States;<sup>2</sup> and it was extremely difficult to reconcile the action of its Government towards the British sealers with

<sup>1</sup> *Award of Arbitrators in the London "Times" of August 16, 1893, and other London and New York newspapers.*

<sup>2</sup> *Wheaton, International Law (Dana's ed.), p. 280, note 108; Wharton, International Law of the United States, I., 105.*

the attitude assumed by Mr. Adams in the controversy with Russia provoked by the ukase of 1821.<sup>1</sup> The contention that the seals are semi-domestic animals, and as such the property of the United States, will hardly bear investigation. They are wild creatures whom each may catch on his own territory or in localities belonging to no one. The United States can claim no rights over them after they have left its waters; for they are then as much beyond its authority as are the big game of the northwest plains when they have wandered across the border into Canadian territory. The assertion that the destruction of the seals at sea is immoral, was an exaggerated statement of the principle that to destroy a useful animal is detrimental to the welfare of the human race. The experts differed widely as to the effect of the sea-fishing upon the numbers of the seals; but even had the evidence in favor of its disastrous consequences been stronger than it was, the United States would not have been justified by it in assuming a right to make their ideas of proper regulation the law of the civilized world. They could legislate for their own citizens in their own vessels on the high seas, not for the citizens of other states lawfully navigating the ships of those states.<sup>2</sup> But undoubtedly they had a strong moral claim on foreign nations for a mutual agreement, which should put an end to all danger of the extermination of the seals. As a result of the arbitration they have obtained such an agreement between themselves and Great Britain; and, if it works well,<sup>3</sup> we may hope that it will be brought, as the treaty directs, to the notice of other maritime powers whose subjects are likely to engage in the fishery, and receive general assent. The creation of what has been well called "an International Game Law" is the true solution of the difficulty. This, and the

<sup>1</sup> Wheaton, *International Law*, § 168; Wharton, *International Law of the United States*, II., 270, 271.

<sup>2</sup> British State Papers, *Correspondence respecting the Behring Sea Fisheries, 1886-1890*, pp. 398, 462; Hon. E. J. Phelps, article in *Harper's Magazine* for April, 1891.

<sup>3</sup> Unfortunately it has not worked well. The two countries are now (1897) in hot dispute as to the alleged extermination of the seals by pelagic sealing.

final and decisive assertion of the freedom of the high seas, are likely to be the permanent results of the arbitration.

### § 107.

Claims to dominion over whole seas may be said to have vanished altogether from International Law. But in the process of departure they left behind them a number of assertions of territorial power over considerable stretches of water along the coasts of maritime states; and it is doubtful how far some of these are alive to-day. Great Britain has never in recent times attempted to exercise the rights of sovereignty over the "King's Chambers";<sup>1</sup> and though Chancellor Kent declared in favor of the "justice and policy" of her claim to "supremacy over the narrow seas adjacent to the British Isles," and referred with approval to similar claims made early in the nineteenth century by American statesmen, including as they did an assertion of the right to prohibit naval warfare between the Gulf Stream and the Atlantic Shore, or at least within a line drawn from headland to headland and along the open coast for four leagues out to sea,<sup>2</sup> it may well be questioned whether any attempt would now be made to enforce these views. Indeed, the general policy of the United States has tended emphatically towards the curtailment of such claims, and is well set forth in a despatch from Mr. Fish, when Secretary of State in 1875, to Sir Edward Thornton, then British Minister at Washington. In it he says: "We have always understood and asserted that, pursuant to public law, no nation can rightfully claim jurisdiction beyond a marine league from its coast."<sup>3</sup> The opinion of the civilized world sets strongly in this direction; and we may consider the few cases in which claims to large bays and broad waterways are still allowed as survivals of an older order.

Rights over waters. (8) Claims to jurisdiction beyond the marine league.

<sup>1</sup> See § 91.

<sup>2</sup> *Commentaries on International Law* (Abdy's ed.), 113, 114.

<sup>3</sup> Wharton, *International Law of the United States*, I., 105.

The British Hovering Acts of 1736 and 1784 assert a jurisdiction for revenue purposes to a distance of four leagues from the shore, and there are acts setting up a similar claim for health purposes. In 1797, 1799 and 1807 the United States Congress legislated to the same effect, and many maritime nations have embodied the like provisions in their laws.<sup>1</sup> Dana argues, however, that the right to make seizures beyond the three-mile limit has no existence in modern International Law, and maintains with regard to the act of Congress of 1797, that it did not authorize the seizure of a vessel outside the marine league, but only its seizure and punishment within that limit for certain offences committed more than three miles, but less than twelve, from the shore.<sup>2</sup> It is very doubtful whether the claim would be sustainable against a remonstrance from another power, even in this attenuated form. When it is submitted to, the submission is an act of courtesy. As Twiss rightly and properly says: "It is only under the comity of nations in matters of trade and health, that a state can venture to enforce any portion of her civil law against foreign vessels which have not as yet come within the limits of her maritime jurisdiction."<sup>3</sup>

### § 108.

The next group of subjects which demand attention are those connected with

#### *The right of innocent passage.*

This may be defined as the right of free passage through the territorial waters of friendly states when they form a channel of communication between two portions of the high seas. There can be no doubt, that when both the shores of a strait which is not more than six miles across are possessed by the same

Rights over  
waters. (4) The  
right of innocent  
passage.

<sup>1</sup> Wharton, *International Law of the United States*, § 32.

<sup>2</sup> Wheaton, *International Law* (Dana's ed.), 258, note.

<sup>3</sup> *Law of Nations*, I., § 190.

power, the whole of the passage is regarded as territorial water; and there are instances of wider straits which are deemed to be under the power of the local sovereign. But these territorial rights do not extend to the absolute exclusion of the vessels of other states from the waters in question. In the days when whole seas were claimed in full ownership, the powers which owned narrow waterways were in the habit of taking tolls from foreign vessels as they passed up or down the straits. The most famous of these exactions were the Sound Dues levied by Denmark upon ships of other powers which sailed through the Sound or the two Belts, on their passage from the North Sea to the Baltic or from the Baltic to the North Sea. Their origin is lost in remote antiquity. The earliest treaties in which they are mentioned regard them as established facts and recognize the right of Denmark to levy them. In the Middle Ages other states negotiated with the territorial power as to their amount, and sometimes made war upon her to reduce exorbitant demands; but no one denied that a reasonable toll might lawfully be exacted. But with the growth of modern commerce these demands became increasingly irksome; and as the old idea of appropriating the ocean gave way to the doctrine that it was free and open to all, it was felt that the navigation of straits which connected two portions of the high seas was an adjunct to the navigation of the seas themselves, and should be as free in one case as in the other. Accordingly, in 1857 Denmark found herself unable any longer to levy the Sound Dues, though her jurists were able to show a clear prescription of five hundred years in her favor. By the Treaty of Copenhagen she gave them up.<sup>1</sup> A large pecuniary indemnity was paid to her by the maritime powers of Europe; but, in order to avoid recognizing by implication any right on her part, the covenanted sum was declared to be given as compensation for the burden of maintaining lights and buoys for the future. In the same year the United States negotiated a separate convention with

<sup>1</sup> Twiss, *Law of Nations*, § 188.

Denmark, whereby all tolls on their vessels were abolished, and, in consideration of a covenant on the part of the King of Denmark to light and buoy the Sound and the two Belts as before, and keep up an establishment of Danish pilots in those waters, they agreed to pay him the sum of "three hundred and ninety-three thousand and eleven dollars in United States currency."<sup>1</sup> These instances show that the common law of nations now imposes upon all maritime powers the duty of allowing a free passage through such of their territorial waters as are channels of communication between two portions of the high seas. The right thus created is, of course, confined to vessels of states at peace with the territorial power, and is conditional upon the observance of reasonable regulations and the performance of no unlawful acts. It extends to vessels of war as well as to merchant vessels. No power can prevent their passage through its straits from sea to sea, even though their errand is to seek and attack the vessels of their foe, or to blockade or bombard his ports. As long as they commit no hostile acts in territorial waters, or so near them as to endanger the peace and security of those within them, their passage is perfectly "innocent." The word, as used in the phrase "right of innocent passage," refers to the character of the passage, not to the nature of the ship.

### § 109.

It is sometimes supposed that the regulations in force for the transit of vessels through the Dardanelles and the Bosphorus

Rights over  
waters. (5) The  
special case of the  
Dardanelles and  
the Bosphorus.

disprove the doctrine we have just laid down as to the extension of the right of innocent passage to ships of war. But a short historical examination of the case will show that it is exceptional, in that it is governed by special treaty stipulations and not by the ordinary rules of International Law. Till 1774, when Russia com-

<sup>1</sup> *Treaties of the United States*, p. 239.



pelled Turkey to open the Black Sea and the straits leading to it from the Mediterranean to merchant vessels, it had been the practice of the Porte, which did not consider itself bound by the public law of Europe, to forbid the passage of the Dardanelles and the Bosphorus to ships of other powers. After 1774 ships of war were still excluded; and in 1809 Great Britain recognized this practice as "the ancient rule of the Ottoman Empire." She was followed in 1840 by Austria, Russia and Prussia, who were parties with her to the Quadruple Treaty of London. The first subsidiary convention attached to the Treaty of Paris of 1856 revised the rule so as to allow the passage of light cruisers employed in the service of the foreign Embassies at Constantinople, and of a few small vessels of war to guard the international works at the mouth of the Danube. A further modification was introduced by the Treaty of London of 1871, which retained the previous rules, but reserved power to the Sultan to open the straits in time of peace to the war vessels of friendly powers, if he should deem it necessary in order to secure the observance of the Treaty of Paris of 1856.<sup>1</sup> These last two treaties have been signed by all the Great Powers, and are universally accepted as part of the public order of Europe. It is clear, therefore, that the rules they lay down are binding; but it is equally clear that these rules rest upon treaty stipulation, and not upon the common law of nations.

We now see that the case of the Dardanelles and the Bosphorus is an exception to ordinary rules, and instead of proving that the right of innocent passage does not extend to vessels of war, it proves the exact contrary; for, if the principle of exclusion applied under International Law, there would have been no need of a long series of treaties in order to bring it into operation. It may be added, that when the regular channel for navigation between two parts of the high seas runs through marginal waters, there is a right of peaceful

<sup>1</sup> Twiss, *Law of Nations*, I., § 189; Holland, *European Concert in the Eastern Question*, 256-257 and 273.

passage along it, which may not be denied or impeded by the territorial power. The accepted modern principle is, that the waterway between open seas is an adjunct of the seas themselves and may be navigated as freely as they.

### § 110.

We now pass on to examine

#### *The position in International Law of interoceanic canals,*

or perhaps we ought rather to say the position of the Suez Canal, since it is the only one of the kind which has been completed and become a fact for International Law to deal with. Its construction raised a new question. Nothing like it had been known since the modern law of nations came into being, and consequently that law contained no rules that were applicable to it. It runs through the territory of a state whose civilization is not in accordance with European models, and which therefore can hardly be trusted to exercise over it the full control of a territorial sovereign in the interests of European commerce. Further, it was made by a company under French influence, and is worked for profit under concessions from the Khedive of Egypt, confirmed by his Suzerain, the Sultan. Moreover, the British Government has become a large shareholder in the company, and the position of the canal as part of one of the great trading-routes of the world gives it an international importance and makes it an object of concern to the diplomacy of the maritime powers. It is *sui generis*, and its legal position could not be defined apart from special agreement. It was opened in 1869, but not till 1888 did the powers of Europe agree upon the rules that should be applied to it, and embody them in a great international document. The intervening time was filled up with disagreements and negotiations, which proved conclusively the truth of the proposition, that International Law as it stood was unable to solve the difficulties

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waters. (6) The  
legal position of  
interoceanic  
canals.

of the case.<sup>1</sup> At last the principle of neutralization was applied to the canal by the convention of Oct. 29, 1888, which was signed by the six Great Powers, and also by Turkey, Spain and the Netherlands. The states which possess the greatest political and commercial interests in the canal have combined to define its legal *status* and lay down the international rules under which it is to be worked. Strictly speaking, their action does not bind the powers that were not parties to the convention, but as none of these latter, except the United States, are of first-rate importance, and all have tacitly acquiesced in what was done, the practical result is much the same as if the whole body of civilized states had formally expressed their adhesion to the new order. The convention declares that the canal is to be open in time of war, as well as in time of peace, to all ships, whether merchantmen or vessels of war, whether belligerent or neutral; but no acts of hostility are to be committed either in the channel itself or in the sea to a distance of three marine miles from either end of it. The entrances to the canal are not to be blockaded; the stay of belligerent vessels of war, or their prizes, in the ports at either end of it is not to exceed twenty-four hours; and belligerents are not to embark troops or munitions of war within the canal or its ports. The right of the Khedive and the Sultan, as territorial powers, to take steps for the protection of the canal in the event of its being threatened is reserved, but hedged about with many securities and restrictions. If it should be necessary for them to resort to force to provide for the safety of the waterway, they are not to erect permanent fortifications along it or interfere with its free use for peaceful purposes.<sup>2</sup> It is much to be wished that, as other great interoceanic canals are made, similar regulations may be applied to them in the interests of peaceful progress.

<sup>1</sup> Lawrence, *Essays on some Disputed Questions in Modern International Law*, II.

<sup>2</sup> British State Papers, *Egypt*, No. 2 (1889).

## § 111.

The next subject we have to discuss under the head of territorial rights over waters and the questions connected therewith is

*The use of sea fisheries.*

The rules of International Law with regard to them are simplicity itself. Within the territorial waters of a state its subjects have exclusive rights of fishing, but outside territorial waters, on the high seas, subjects of all states are free to fish on the one condition that they do so peacefully. These rules are, however, often modified by conventions, giving to subjects of one power the right to fish in certain specified portions of another's marginal waters; and sometimes controversies arise as to the meaning and extent of such concessions. Moreover, fisher-folk are apt to quarrel among themselves in places where the subjects of two or more states have rights in common. To settle these disputes often requires a good deal of negotiation, and the simple precepts of the common law of nations are interpreted and overlaid by a large number of conventional rules. We have already seen how this may take place, when we gave an account of the Behring Sea dispute in connection with the subject of claims to dominion over open waters.<sup>1</sup> The North Sea Fisheries Convention of 1888 will afford another illustration. It provides, among other things, for the police of the fishing-grounds in the North Sea which, being outside territorial waters, are enjoyed in common by the subjects of all the signatory powers. The contracting parties agree to send cruisers to enforce the regulations laid down in the convention, and in serious cases to apprehend offenders and take them into one of the ports of their own country for trial.<sup>2</sup> No grave international disagreement exists in connection with these fisheries; but at the present time

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of sea fisheries.

<sup>1</sup> See § 106.

<sup>2</sup> Hertslet, *Treaties*, XV., 795 *et seq.*

(1894) Great Britain and France are engaged in a serious and long-standing dispute with regard to the exact nature and extent of the rights given to French fishermen along a portion of the coast of Newfoundland by the Treaty of Utrecht and subsequent agreements. Moreover, the questions concerning the Canadian fisheries, which have from time to time arisen between Great Britain and the United States, have not yet reached a final and satisfactory settlement. In further illustration of the subject we will give a brief account of the diplomatic history of this important matter.

By the treaty of 1783, which recognized the independence of the United States, their inhabitants were granted rights of fishing on "such part of the coast of Newfoundland as British fisherman shall use" and also on the coasts of all other British dominions in North America.<sup>1</sup> During the War of 1812 these rights could not be exercised. The Treaty of Ghent, which concluded the struggle in 1814, was silent upon the subject of the fisheries; and in consequence a controversy arose between the two governments. The United States claimed that the treaty of 1783 did but recognize fishing-rights which existed independently of it, and therefore remained intact even if the fishery clause in it were abrogated by the war. The British held that the rights in question were created by the treaty, and fell to the ground when the outbreak of war destroyed the clause on which they rested. The matter was settled for a time by the treaty of 1818, by which it was agreed that citizens of the United States should have in future the liberty of taking fish of every kind on a clearly defined part of the coast of Newfoundland, and also on the southern and eastern coasts of Labrador, but not in the territorial waters of other portions of the North American possessions of Great Britain. American fishermen were "to have liberty forever to dry and cure fish in any of the unsettled bays, harbors, and creeks of the southern part of the coast of Newfoundland hereabove described, and of the coast of Labrador," but were to lose this

<sup>1</sup> *Treaties of the United States*, p. 377.

privilege as soon as the inlets became settled, unless the inhabitants chose to allow them to land as before. With regard to other bays and harbors, the fishermen of the United States were to be permitted to enter them "for the purpose of shelter and of repairing damages therein, of purchasing wood, and of obtaining water, and for no other purpose whatever."<sup>1</sup> This treaty is important, because the subsequent diplomatic history of the question hinges upon it. All other arrangements have proved to be temporary, and when they have one by one disappeared, the powers concerned have been thrown back upon its stipulations. Unfortunately, the progress of colonization, and the improvements which have taken place in the appliances used for fishing, have rendered it very inadequate to the conditions under which the industry is pursued in modern times, and in addition complications have arisen as to the meaning to be attached to the phrase "coasts, bays, creeks, or harbors." The English authorities have been disposed to claim wide inlets and great expanses of water as British bays from which American fishermen were excluded by the terms of the treaty, while the authorities of the United States have endeavored to restrict British waters within narrow limits and place the widest construction upon the rights accorded to their fellow-citizens in them. The treaty of 1818 remained in force for thirty-six years, when the disputes which arose under it became so numerous and so troublesome, that an attempt was made to solve them on the basis of mutual concession, and they were included along with matters of trade and navigation in the Reciprocity Treaty of 1854. The extent of British coast along which American fishermen were allowed to ply their craft was greatly enlarged, and British fishermen received in return the right of fishing along the eastern coast of the United States north of the 36th parallel of latitude, fisheries in rivers and the mouths of rivers being in both cases reserved to subjects of the territorial power. Moreover, provision was made for the delimitation

<sup>1</sup> *Treaties of the United States*, pp. 415, 416.

of the boundaries of such places as were excluded from the common liberty of fishing. The treaty was to remain in force for ten years, and after that time each of the contracting parties possessed the right of bringing it to an end by giving a year's notice to the other.<sup>1</sup> The Government of the United States "denounced" it in 1865, and in 1866 it ceased to exist. The two powers were thus thrown back upon the treaty of 1818, which proved as productive of disagreements as before; and in 1871 another attempt at a settlement was made in the famous Treaty of Washington which provided for the Alabama arbitration. By it the provisions of the Reciprocity Treaty of 1854 were re-established with a few alterations and additions. British subjects received the right to fish on the eastern coasts of the United States north of latitude 39° instead of latitude 36°, and it was agreed that a commission should sit to determine whether the rights granted by Great Britain to the United States were more valuable than those granted by the United States to Great Britain, in which case a corresponding pecuniary indemnity was to be paid by the United States to Great Britain.<sup>2</sup> This provision was a virtual abandonment of the original contention that the inhabitants of the United States had a right apart from treaty stipulations to share in the British fisheries. Indeed, the whole course of the negotiations from 1818 onwards shows that the matter was felt to be one for mutual concession. The commission appointed under the treaty of 1871 decided in favor of Great Britain, and awarded her compensation to the amount of five and a half million dollars, which the United States Government promptly paid, though they contended it was greatly in excess of the value of the rights their citizens had gained. At the end of ten years from the time when the fishery arrangements came into force in 1873, either party to the treaty was to have the right of terminating them by giving two years' notice to the other. They were brought to an end in 1885 in consequence of notice given by the President of the United States

<sup>1</sup> *Treaties of the United States*, pp. 448-453.    <sup>2</sup> *Ibid.*, pp. 480-488.

in 1883. The provisions of the treaty of 1818 were revived thereby, and the old difficulties began immediately to recur. In the hope of terminating them the British Government sent plenipotentiaries to Washington in 1887 charged with the duty of negotiating a fresh fishery treaty. They succeeded in coming to an agreement with the American plenipotentiaries upon the basis of a minute and accurate delimitation of the bays within which the inhabitants of the United States were forbidden to fish by the treaty of 1818, and of an equally elaborate description of the privileges and duties of American fishing-vessels in Canadian ports and harbors.<sup>1</sup> But the treaty they negotiated was refused ratification by the Senate of the United States; and the contracting parties were thrown back upon the provisions of a *modus vivendi* which had been agreed upon by the plenipotentiaries as a means of avoiding difficulties in the interval between the signing of the treaty and its coming into force.<sup>2</sup> It is much to be wished that no long time may elapse before a final settlement is arrived at, and an irritating controversy between two kindred and friendly nations ended on terms satisfactory and honorable to both.

### § 112.

The last point we have to deal with in connection with our present subject is

#### *The navigation of great arterial rivers.*

International questions arise when a navigable river flows in part of its course through the territory of one state, and in part through the territory of another. There can be no doubt that each state possesses territorial rights over that portion of the river which is entirely within its own boundaries. But have all the

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navigation of great  
arterial rivers.

<sup>1</sup> British State Papers, *United States*, No. 1 (1888).

<sup>2</sup> For the whole subject see Wharton, *International Law of the United States*, §§ 301-308; Wheaton, *International Law* (Dana's ed.), pp. 342-350 and note 142; Hall, *International Law*, § 27.



riverian states a right to navigate the whole river, or may each exclude the vessels of the others from its own portion of the waterway? There is no general agreement among authoritative writers on International Law with regard to this question. Some hold that there is a right of navigation,<sup>1</sup> others deny the existence of anything of the kind,<sup>2</sup> while a third school declare that the right is imperfect, by which they mean that it cannot be claimed apart from special agreement and may be surrounded in its exercise with what restrictions the territorial power sees fit to impose.<sup>3</sup> These last are evidently using self-contradictory phraseology; for a right that cannot be insisted upon is no right at all, but a mere permission depending on good-will. The other two schools are so flatly opposed to one another in their doctrines, that they give us no useful guidance. We must therefore examine for ourselves the cases that have occurred, and endeavor to obtain from them some consistent rule. We find that the great European rivers which run through the territories of more powers than one were subject to tolls till the beginning of the present century. But in 1804 the Congress of Rastadt abolished the Rhine tolls; and in 1815 the Congress of Vienna decided that the great rivers of Western Europe should for the future be open to navigation, and that the tolls to be levied on each of them should be settled by common accord among the riverian powers. In pursuance of this agreement, the Rhine, the Elbe, and other rivers were at various times after 1815 opened to free navigation on payment of such moderate dues as were sufficient to recoup the territorial powers for their expenditure upon the waterway.<sup>4</sup> The Danube was freed by the Treaty of Paris of 1856, and a European commission was charged with the duty of executing the necessary engineering works at its mouth and permitted to levy tolls sufficient to pay their cost. The

<sup>1</sup> *e.g.*, Calvo, *Droit International*, § 291.

<sup>2</sup> *e.g.*, Twiss, *Law of Nations*, I., § 145.

<sup>3</sup> *e.g.*, Wheaton, *International Law*, § 193.

<sup>4</sup> Hall, *International Law*, § 39.

authority of this commission has been continued and increased by a series of international agreements, the last of which, made in 1883, prolonged its powers for twenty-one years from that date and provided for their further prolongation from time to time.<sup>1</sup>

If we turn to the New World we find the same tendencies at work with regard to the great arterial rivers of the North American continent. When the United States obtained formal recognition of their independence from Great Britain in 1783, Spain held Louisiana and Florida and thus possessed both banks of the Mississippi at its mouth and for a considerable distance inland. The American Government claimed for its citizens free navigation to the sea as a right; but after long negotiations the dispute was terminated in 1795 by the Treaty of San Lorenzo el Real, which provided that the navigation of the river from its source to its mouth should be free to the subjects and citizens of the two powers.<sup>2</sup> With regard to the St. Lawrence events followed a similar course. The United States asserted and Great Britain denied, that American citizens had a right by the law of nations to navigate that portion of the river which flows entirely through Canadian territory. The Reciprocity Treaty of 1854 granted the privilege demanded in return for a grant to British subjects of freedom to navigate Lake Michigan, but reserved a right of suspending the concession on giving due notice; and finally by the Treaty of Washington of 1871 the navigation of the British portion of the St. Lawrence was thrown open "forever" to citizens of the United States.<sup>3</sup>

The conclusion to be drawn from these facts seems evident. It is that while as a matter of strict right a state possessed of one portion of a navigable river can exclude from that portion

<sup>1</sup> Holland, *European Concert in the Eastern Question*, 248-250, 308-322.

<sup>2</sup> Twiss, *Law of Nations*, I., § 145; *Treaties of the United States*, 1007, 1382-1384.

<sup>3</sup> Wharton, *International Law of the United States*, § 30; *Treaties of the United States*, p. 488.

the subjects of the other riverain states, yet as a matter of comity it refrains from exercising its full rights in this respect, nor does it levy tolls for any other purpose than to provide lights and buoys and cover the incidental expenses of keeping the waterway in good condition. We may further say that the tendency in favor of freedom of navigation is so strong that any attempt to revive the exercise of the right of total exclusion, or even to levy tolls for profit, would be regarded as an aggression. Usage is turning against the ancient rule. It is now set aside by treaty stipulations; but in time the new usage founded upon them will give rise to a new rule, and no treaty will then be required to provide for the free navigation of a river by the co-riparian states. It is an admitted principle that the right of traversing the stream carries with it the right of using the banks for purposes incidental to navigation.

When a large navigable river runs in its entire course through the territory of one state, the right of exclusion probably still remains. But no difficulties arise in practice; for all nations civilized after the European model allow, and even encourage, the navigation of their arterial waters by the ships of other states. In most cases the permission to navigate is tacitly given; but in some South American instances, where exclusion has till recently been the rule, rivers have been thrown open by a formal act of the state. Thus in 1867 the Emperor of Brazil issued a decree opening the navigation of the Amazon and its tributaries to the merchant vessels of all nations.<sup>1</sup> The powers concerned in the opening up of Africa have already begun to apply to its arterial rivers the principles previously admitted in the case of the great navigable streams of Europe and America. In 1885 the Final Act of the West African Conference decreed that the Congo and the Niger and their affluents should be freely open to navigation by the merchant ships of all nations without exception or discrimination.<sup>2</sup>

<sup>1</sup> Wharton, *International Law of the United States*, I., 98.

<sup>2</sup> British State Papers, *Africa*, No. 4 (1885), pp. 308, 311.

## CHAPTER III.

### RIGHTS AND OBLIGATIONS CONNECTED WITH JURISDICTION.

#### § 113.

**A state has jurisdiction over all persons and things within its territory, with a few exceptions.**

THERE are two principles either of which could be made the basis of a system of rules with regard to jurisdiction. It might be held that the authority of the state should be exercised over all its citizens wherever they may be found, or that it should be exercised over all persons and all matters within its territorial limits. Modern International Law, being permeated throughout by the doctrine of territorial sovereignty, has adopted the latter principle as fundamental. But, inasmuch as it could not be applied at all in some cases and in others its strict application would be attended with grave inconvenience, various exceptions have been introduced based upon the alternative principle that a state has jurisdiction over its own subjects wherever they may be. All that we can venture to put forth in the way of a broad general proposition is that Jurisdiction is in the main territorial. In order to deal with the subject properly we must attack it in detail ; and the first rule we will lay down is that **A STATE HAS JURISDICTION OVER ALL PERSONS AND THINGS WITHIN ITS TERRITORY.** There are a few exceptions ; but we will not consider them till we have dealt with the general principles.

#### § 114.

Among the persons who, being within the state's territory are subject to its jurisdiction, the first class to be considered

are its *Natural-born Subjects*. Each country defines for itself by its Municipal Law what circumstances of birth shall make a person its subject. It <sup>Natural-born subjects.</sup> may consider the locality of the birth to be the all-important point, making a subject of every child born within its territory no matter whether the parents are natives or foreigners; or it may regard the nationality of the parents, or one of them, as the determining circumstance, making subjects of the children of subjects, wherever born, and aliens of the children of aliens, wherever born. Both principles give the same result in the case of those born within the state of parents who are its subjects, and such persons will always form the vast majority of the inhabitants of any but a very new country. There can be no doubt that they are natural-born subjects, whether the law of the land adopts the first or the second of the views just enunciated. But in other cases these principles lead to different results. For instance, those born outside the state's territory of parents who belong to the state are aliens according to the first principle, but subjects according to the second; and those born within the state's territory of parents who do not belong to the state are subjects according to the first principle, but aliens according to the second. States are free by virtue of their independence to adopt in these matters what principles they please, and they embody in their laws a great variety of rules. The result is that conflicting claims and difficulties of all sorts arise on the subject of nationality and citizenship. England and the United States, for instance, adopt with regard to children of their own subjects and citizens the rule of nationality. Though born abroad they are British or American subjects as the case may be.<sup>1</sup> With regard to the children of foreigners the two countries adopt the principle of locality, and claim as their own all children born within their

<sup>1</sup> 7 Anne, c. 5; 4 Geo. II., c. 21; 13 Geo. III., c. 21; *Revised Statutes of the United States*, §§ 1993, 2172.

dominions.<sup>1</sup> France on the other hand adopts for all purposes the principle of nationality, and holds children to be subjects of their parents' state, wherever they may be born.<sup>2</sup> Thus a child born in England of French parents would be a British subject according to the law of England, and a French subject according to the law of France. In such cases there is evident danger of serious complications if each state acts upon its extremest rights. But difficulties are generally avoided by the tacit consent of each to attempt no exercise of authority over such a citizen as long as he remains outside its borders, and to make no objection to the exercise of authority over him by the other while he resides within its limits. And further, the laws of several countries give to persons of double nationality a right of choice on arriving at years of discretion. Thus in England the child of aliens may elect to possess the nationality of his parentage when he comes of age,<sup>3</sup> and in France the child of aliens may in like manner choose French nationality.<sup>4</sup> Illegitimate children are as a rule held to belong to the state of which their mother is a subject. In matters like these International Law simply recognizes as facts the results of the operations of Municipal Law. It does not define who are natural-born subjects; but it does say that all the natural-born subjects of a state are under its jurisdiction within its territories and entitled to its protection outside them. Their privileges with respect to the state are of the widest kind, as also are their obligations towards it. The tie of allegiance between it and them is drawn very close. In most countries they are eligible for offices denied even to naturalized subjects and citizens, and their responsibilities are commensurate with their rights.

<sup>1</sup> *Constitution of the United States*, 14th Amendment; *Calvin's Case*, for which see Howell's *State Trials*, Vol. II., and Broom's *Constitutional Law*.

<sup>2</sup> *Code Civil*, I., I., i., 10.

<sup>3</sup> 33 & 34 Victoria, c. 14.

<sup>4</sup> *Code Civil*, I., I., i., 9.

## § 115.

The next class in importance of those who being within the territory are under the jurisdiction of the state are *Naturalized Subjects*. They are persons between whom and the state the tie of allegiance has been artificially created by a process termed Naturalization. Sometimes naturalization takes place without any special formalities as an inseparable incident of something else. For instance, when a subject marries a foreign woman by the law of most countries the wife acquires the nationality of her husband and loses her own. The United States, however, do not look upon an American woman married to a foreigner as subject to all the disabilities of alienage, though they regard a foreign woman married to an American as an American subject.<sup>1</sup> But naturalization is usually effected by a separate formality, which takes place when a foreigner situated in a country wishes to acquire therein the rights of citizenship. It is the policy of most states to put little difficulty in the way of the reception of new subjects under such circumstances, though many of them dislike the naturalization of their own subjects in foreign states. International Law prescribes no general formalities for use when a change of allegiance is effected ; but the law of each state lays down the conditions on which it will receive foreigners into the ranks of its citizens. Thus in the United States the general rule, to which, however, there are several exceptions, is that the alien who wishes to become a citizen must make a declaration on oath to that effect before a court after three years' residence in the country ; and after he has remained within the territory for two years more, making in all five years of residence, he must take an oath of fidelity to the United States and renunciation of his former allegiance.<sup>2</sup> In Eng-

<sup>1</sup> Wharton, *International Law of United States*, § 186.

<sup>2</sup> *Revised Statutes*, Title XXX., Naturalization.

land till lately naturalization could be effected only by Act of Parliament; but under a law<sup>1</sup> passed in 1870 a certificate of naturalization may be granted at his discretion by the Secretary of State for the Home Department to any alien who has resided in the United Kingdom or been in the service of the Crown for five years, on condition that he continues to reside or serve as before. The applicant must take the oath of allegiance, and when he has done so and obtained the certificate he becomes a British subject within the United Kingdom. India and the Colonies have laws of their own with regard to naturalization in them. The legal effects of naturalization, in so far as they concern the person naturalized in his relation to the state of his choice, are determined exclusively by its law. He has to fulfil all the duties of a natural-born citizen, yet some states do not grant him all the political rights of one. In England till recently he could not sit in either House of Parliament or be a member of the Privy Council; but the Naturalization Act of 1870 removed all political disabilities, and placed him on the same footing as a natural-born subject. In the United States all Federal offices, except those of President and Vice-President, are open to naturalized citizens.<sup>2</sup>

### § 116.

International questions may arise when a naturalized subject of a state returns to the country of his original allegiance and claims to be treated there as a citizen of his new country. Is he to be so regarded, or is he rightly made to perform towards the state of his birth all the obligations of a citizen while he resides within its territory? The practice of states is diverse on this point, and the most conflicting views have been enunciated. The laws of civilized com-

International  
questions con-  
nected with  
naturalization.

<sup>1</sup> *The Naturalization Act*, 33 & 34 Victoria, c. 14.

<sup>2</sup> *Constitution of the United States*, Art. II., § 1.



tries differ both as to the position they take up towards their own citizens naturalized abroad and as to the protection they afford to foreigners who have become their citizens by naturalization. With regard to the subject who has acquired a foreign nationality, we find that on the one hand the old doctrine of inalienable allegiance, set forth in the maxim *Nemo potest exuere patriam*, is still acted upon in all its severity in Russia,<sup>1</sup> and that on the other hand a "right of expatriation" has been asserted by the Congress of the United States in a statute of 1868 to be "a natural and inherent right of all people."<sup>2</sup> Between these extremes the law of the great majority of states hovers, imposing conditions upon expatriation and declaring that the subject naturalized abroad loses by naturalization his quality of citizen for most purposes. Some states, like Italy,<sup>3</sup> still regard him as subject to military service, and several consider him to be punishable with death if he bears arms against his native country. In the converse case of a citizen of a foreign country who has become a naturalized subject, some states regard him as entirely and for all purposes on an equality as to rights and protection with their born subjects, while others recognize that the country of his birth still has rights against him, which it may enforce if he goes within its territory. The legislative department of the United States Government seems to be in advance of the executive in its doctrine of a natural right of expatriation. Mr. Wheaton, when Minister at Berlin in 1840, refused to take up the case of J. P. Knacke, a Prussian who had been naturalized in the United States and had returned to Prussia. He was there compelled to serve in the Prussian army, and Mr. Wheaton held that the United States could not

<sup>1</sup> British State Papers for 1869, *Report of the Naturalization Commission*, Appendix, p. 59.

<sup>2</sup> *Revised Statutes*, § 1999.

<sup>3</sup> British State Papers for 1869, *Report of the Naturalization Commission*, Appendix, p. 28.

interfere to protect him in the country of his birth. Mr. Webster took similar ground when Secretary of State in 1852 in the cases of Ignacio Tolen, a Spaniard, and Victor Depierre, a Frenchman. But General Cass, who held the same high office in 1859, drew a distinction in the case of Hofer, a Prussian, between inchoate and perfect obligation, and claimed a right to protect naturalized citizens in the countries of their birth unless the offence was complete before expatriation. The Prussian Government declined to admit this contention, but gave a discharge from the army at the request of the United States Minister, thus granting as a favor what it refused as a right.<sup>1</sup> The executive department has never gone beyond the position taken up by General Cass, and has succeeded in getting it embodied in recent treaties. The year 1868 witnessed considerable activity of negotiation on the subject of Naturalization, and conventions were negotiated with Austria, the North German Confederation which grew in 1870 into the German Empire, and Baden. These have since been followed by others, and nearly all of them expressly provide that a naturalized citizen of one country who is by birth a subject of the other may be tried on his return to his fatherland for offences against its laws committed before his emigration. In some special mention is made of military service, and it is stipulated that the obligation must have actually accrued before emigration in order to render the offender liable to military duty on his return, or to trial and punishment for the neglect of it. The possibility of a future call to service is not enough. The call must actually have been made.<sup>2</sup> Till recently the law of Great Britain embodied the doctrine of inalienable allegiance; and one of the chief causes of her

<sup>1</sup> Halleck, *International Law* (Baker's ed.), I., 357-359; Wheaton, *International Law* (Dana's ed.), 142, note; Wharton, *International Law of the United States*, § 181.

<sup>2</sup> See Art. II. of the Baden Treaty of 1868; *Treaties of the United States*, p. 43.

war with the United States in 1812 was the rigor with which that doctrine was applied by her Government. British cruisers took from American vessels on the high seas naturalized American citizens and impressed them for service in the royal navy, on the grounds that they were British subjects by birth and that no forms gone through in America could divest them of their British nationality. But practice softened as the century wore on, and gradually opinion changed, till by the Naturalization Act of 1870 the old doctrine of the common law was abandoned and Great Britain recognized the naturalization of her subjects abroad. The Act laid down that they lost their British citizenship by voluntarily assuming citizenship in another state; and, with regard to naturalized citizens of Great Britain, it declared that they would be protected wheresoever they might be except in the country of their original allegiance. They would not be entitled to the privileges of British citizens within its borders, unless by acquiring their new nationality they ceased to be its subjects according to its laws or the stipulations of a treaty made with it.

This rule seems to accord best with sound and undoubted principles. A state as an independent political unit has a right to accept as citizens on its own conditions all who may come into its territory and desire to attach themselves to it. But it can hardly claim a right to dictate to another state the conditions on which that state shall give up all claim to the allegiance of its born subjects. To do so would be to intrude into the sphere of its legislation and trench upon its independence. No surer method of producing international complications could well be found; whereas the rule of leaving to the state of birth to determine whether it will recognize the new citizenship or not, when the individual who has acquired it returns within its territory, precludes all possibility of controversy, while recognizing both the right of the naturalizing state to acquire citizens in its own way, and the right of the mother state to deal as it thinks fit

with all persons in its dominions who are its subjects according to the provisions of the local law. The United States and some other countries, as we have just seen, endeavor to settle these questions by treaty. It cannot be said that there is any rule of International Law with regard to them. Neither opinion nor practice is yet sufficiently uniform to create one ; but the tendencies seem in favor of the rule of the United States treaties or the rule of the British Naturalization Act. Both are based upon the same principle ; but the treaties stop short in its application, whereas the Act carries it to its logical conclusion. There can be no doubt that a naturalized citizen can denaturalize himself and get rid of his acquired character, just as he got rid of the character given him by birth. If he returns to his fatherland and shows an intention to remain there indefinitely, his original nationality easily reverts to him.<sup>1</sup>

### § 117.

Having dealt with natural-born and naturalized subjects, we have now to deal with a class of persons who are not subjects at all, but whose long residence within a state gives them a peculiar position under its law. They are called *Domiciled Aliens*. In order to obtain a domicile in a particular place it is necessary to reside there and to have an intention to remain in it for an indefinite time. In short a man's domicile is his home. Temporary absences will not destroy his legal relation to it ; for whenever he goes away he has an intention of returning. It is not necessary that he should mean to spend his entire life there. A subject of one country may go into another for business purposes, with the intention of returning to his own land when he has made a fortune or acquired a certain position. But seeing that his stay is of indefinite duration, and that while it lasts the centre of his affairs and his

*Domiciled aliens.*

<sup>1</sup> Wharton, *International Law of the United States*, §§ 176-179, 190.

domestic relations are in the foreign country, he is domiciled there. He need not become a citizen in order to acquire a domicile. The great majority of residents in a country are its citizens and subjects; but neither in law nor in fact is there any necessary connection between citizenship and domicile. The former is a relation between state and subject created by the law and depending entirely upon its provisions. The latter is a fact of which the law takes note and on which it bases many of its rules. Most persons are domiciled in the country of which they are citizens; but it is quite possible for a man to be a citizen of one state and have his domicile in another; and it is in these latter cases that international questions sometimes arise owing to the conflicting claims of the two countries.

For international purposes domicile is of two kinds—*Domicil of Origin*, which in the case of legitimate children is the domicile of the father at the time of birth and in the case of illegitimate children that of the mother at the same time; and *Domicil of Choice*, which is the domicile deliberately adopted by a person of full age.<sup>1</sup> Till years of discretion are reached the domicile of a child may be changed by a change of domicile on the part of parents or guardians, but not by its own volition. A domicile of choice is by no means unchangeable. A man may lose it and gain another by the same means as those by which he acquired it; and if he returns to his own country his domicile of origin easily reverts to him. It is difficult to say with any degree of exactness how far the rules with regard to domicile come within International Law. In so far as they bear upon questions of belligerent capture, and the liability of the domiciled alien to war-burdens both personal and pecuniary, they clearly belong to the province of the publicist, and we shall discuss them when we come to consider the Law of War.<sup>2</sup> But in so far as they deal with a man's private rights and obligations, they seem to be outside the bounda-

<sup>1</sup> Westlake, *Private International Law*, §§ 243, 253.

<sup>2</sup> See § 177.

ries of our subject, though many authors go into them at length under the head of what is called Private International Law.<sup>1</sup> We will briefly indicate the chief matters to which they apply; and it will be evident from our enumeration that the domiciled alien is to a very large extent under the jurisdiction of the country in which he resides.

The *lex domicilii* determines all matters of personal *status* which are not purely political, it regulates the succession to personal property in cases of intestacy, it settles the validity of any will relating to personalty, and it decides upon capacity to enter into ordinary contracts, and even upon capacity to marry in England, the United States, and Teutonic countries generally.<sup>2</sup> The law of France, however, regards this last as part of the *status* of a French citizen, and considers it to be attached to him wherever he may go, as long as he retains his French citizenship. Marriages contracted by Frenchmen abroad must therefore be entered into with all the forms required by the law of France, if they are to be valid in France.<sup>3</sup>

For testamentary and most other purposes a man can have but one domicile; but for commercial purposes and for purposes of belligerent capture he may have more than one, since he may reside in one country and have a house of trade in another, or be a partner in several firms situated in different countries. When a foreigner is domiciled in a belligerent country his property therein is subject to the risks of war, but he cannot be compelled to serve in the army of the state in which he resides. The question whether he may be forcibly enrolled in the Militia or National Guard is more doubtful. In the American Civil War Great Britain seemed content that her subjects domiciled in the territory of the Republic should serve in the local militia; and in one case, that of Scott, she declined to

<sup>1</sup> See § 6.

<sup>2</sup> Bar, *Private International Law*, §§ 90 *et seq.*

<sup>3</sup> Wheaton, *International Law* (Dana's ed.), 151 and note.

interfere to prevent an enrolment in the fighting forces. But Scott had declared his intention of becoming a naturalized American subject, and of adhering to the United States if war had broken out at the time of the Trent affair;<sup>1</sup> and probably it was thought that a citizen whose allegiance sat so lightly upon him had little claim for consideration from his native state. Certain it is that a vigorous protest was addressed to the Government of the Southern Confederacy against its practice of regarding British subjects domiciled within its territory as liable to conscription. There is a clear distinction between the maintenance of social order, which may well be required of every one who lives under the protection of the local laws, and the furtherance of political ends, which ought only to be asked of those who are members of the body politic. The recognition of this principle would lead in practice to the rule that foreigners resident in the country might be required to serve in any local force raised for defending life and property against the enemies of society, but could not be compelled to serve in the army or militia.<sup>2</sup> Any state might without offence declare that it would insist upon the application of this rule to its subjects domiciled abroad. There are in fact a considerable number of treaties in existence whereby the contracting powers provide that their subjects domiciled in each other's territory shall not be called upon for war-services. The Commercial Treaty of 1871 between the United States and Italy contains stipulations to that effect,<sup>3</sup> and, among the leading powers of Europe, Great Britain, France and Russia have been parties to such agreements. It is hardly possible to say that the rule in question is part of the common law of nations; but it seems in a fair way to become so, since opinion and practice are turning strongly in its favor. An attempt made by Nicaragua in October,

<sup>1</sup> Halleck, *International Law* (Baker's ed.), I., 361, note.

<sup>2</sup> Hall, *International Law*, § 61.

<sup>3</sup> *Treaties of the United States*, p. 582.

1893, to amend its Constitution so as to make foreigners liable to extraordinary burdens, and even military service, produced immediate action on the part of the resident Minister of the United States and was abandoned in consequence.

### § 118.

Aliens, even though they are not domiciled in a state, may come under its laws and jurisdiction to a certain limited extent when within it as *Travellers passing through its Territory*. Such persons are under its criminal jurisdiction for breaches of the peace and other offences against person and property committed within its dominions ; and any contracts they made could be enforced by process directed against their persons, as well as against any property they might possess in the state in question. But their political rights could be in no way affected by their temporary sojourn within the borders of a foreign state.

Travellers passing through its territory.

### § 119.

Things as well as persons are under the jurisdiction of the state within whose territory they are found. The most important of them is *Real Property*, which may be roughly said to consist of houses and lands, and immovables generally. For all purposes of testamentary and intestate succession, of contracts and of legal proceedings, the law of the country where it is situated, the *lex loci rei sitæ*, applies to it.<sup>1</sup> We have seen that the rule as to *Personal Property*, or movables, is that the *lex domicilii* of the owner prevails ; but in the vast majority of cases the *lex domicilii* is also the law of the country in which the property is situated. It does, however, sometimes happen that a man owns personal property in one

Rules relating to various kinds of things within the territory.

<sup>1</sup> Phillimore, *Commentaries*, Vol. IV., Ch. xxviii. ; Bar, *Private International Law*, § 220.



country while he is domiciled in another. In such cases the law of the latter prevails. But this rule is not entirely without qualification. It seems, for instance, that, if the owner dies, the tribunals of the state where the property is situated will assist their own citizens to recover debts, and that stocks must be transferred according to the *lex sitûs*.<sup>1</sup> There is one sort of movable of so important and exceptional a kind, that International Law sets it as it were in a class by itself, and applies special rules to it. We refer to ships. A state's authority over *its own ships, both public and private, in its waters* is absolute. Its jurisdiction extends to their crews also. Those of public vessels, being in the service of the state, are, of course, wholly and entirely under its control; those of merchant vessels come within the territorial jurisdiction, even as regards seamen of foreign nationality. *Foreign merchant vessels within the ports and territorial waters of a state* are subject to the local law and the local jurisdiction. By coming within the territorial waters of a friendly power they put themselves for the time being under the authority of that power. All criminal acts done on board them are justiciable by its tribunals, the ministers of its justice have full power to enter them and make arrests, and the crews are subject to the local law when on board their vessels as well as when on shore. This proposition follows necessarily from the conception of territorial sovereignty, as was clearly seen by Mr. Marcy when, as American Secretary of State in 1855, he wrote to Mr. Clay, "As a general rule the jurisdiction of a state is exclusive and absolute within its own territories, of which harbors and territorial waters are as clearly a part as the land."<sup>2</sup> France, however, draws a distinction between two classes of acts done on board a foreign merchant ship in one of her ports. If the act concerns members of the crew only and does not

<sup>1</sup> Wheaton, *International Law*, § 136; Phillimore, *Commentaries*, Vol. IV., Ch. xxviii.

<sup>2</sup> Wharton, *International Law of the United States*, § 36 a.

take effect outside the vessel, she exercises no jurisdiction over it. If it concerns members of the crew and other individuals, or takes effect outside the vessel to the danger of the peace or health of the port, she will take cognizance of it. It is sometimes claimed that this rule is International Law ; but it is not based upon general or long-continued usage, nor is it a logical deduction from any universally admitted principle. On the contrary it restricts in some measure the application of the fundamental principle of territorial sovereignty. Yet it has many recommendations. It limits the sphere of local authority to the necessities of local security, and leaves the interior discipline and economy of the vessel to be regulated by the laws of its own country, thus giving effect to the jurisdiction of each state in the sphere which seems naturally and properly to belong to it. The French rule or a modification of it has been received with much favor in recent times. Some states have refused to exercise authority over foreign merchantmen in their ports in cases where nothing beyond the internal economy of the vessel was concerned, and many treaties have been negotiated in which the contracting parties bind themselves not to interfere on board one another's vessels in their ports, unless the peace or safety of the neighborhood is threatened or some person other than a member of the crew is concerned. Thus in 1866 the United States refused to compel the seamen on board a British merchant ship in American territorial waters to perform their duties as mariners,<sup>1</sup> and in 1870 they entered into a Consular Convention with Austria, followed the next year by one with the German Empire, in each of which was embodied the rule above described, with the further proviso that "Consuls, Vice-Consuls or Consular Agents, shall have exclusive charge of the internal order of the merchant vessels of their nation."<sup>2</sup> There is no difficulty in carrying out these provisions ; nor does a state leave the door open

<sup>1</sup> Wharton, *International Law of the United States*, § 35.

<sup>2</sup> *Treaties of the United States*, pp. 34, 366, 367.

to confusion and anarchy by refusing to exercise jurisdiction in certain cases over foreign merchant vessels in her ports. The principle of territorial sovereignty and territorial jurisdiction over-rides that of the authority of a state over its merchantmen, when the two conflict. But if the former is not enforced the latter at once revives, and the vessels and crews come under the laws of their own country to the exact extent of their exemption from the laws of the country in whose waters they are staying. It is quite possible that French practice may in time become a rule of International Law. At present its application has to be secured by special treaty stipulations.

### § 120.

The second of our fundamental rules on the subject of jurisdiction is that **A STATE HAS JURISDICTION OVER ALL ITS SHIPS ON THE HIGH SEAS.** For no purpose can the complete jurisdiction of a state over its *public vessels on the high seas* be over-  
A state has jurisdiction over all its ships on the high seas.  
 ridden or qualified by any exercise of authority on the part of another state. Even the right of search does not apply to them; and while the merchant vessels of neutrals must submit to be overhauled by the cruisers of both belligerents, their men-of-war are as free from molestation as they would be in time of profound peace. So absolute are the rights of a state over its public ships that some writers have sought to account for them by the statement that such vessels are floating portions of the territory of the state to which they belong.<sup>1</sup> Obviously this is a fiction; but under the name of the principle of extraterritoriality it has been made the basis of much elaborate reasoning, and has been very influential in the development of theories of immunity from territorial jurisdiction. We shall meet it again in connection with other subjects. Here it is sufficient to say that the position accorded by International Law to public vessels rests upon

<sup>1</sup> e.g. Hautefeuille, *Droits des Nations Neutres*, I., 253-255.

considerations of convenience and utility and receives ample support from the practice of civilized states. There is no need to invent a fiction in order to account for it, when we remember that a public vessel is under the command of the government of the country to which she belongs, and that to allow any other authority to detain her upon the high seas would be to derogate from its sovereignty and interfere with the due performance of its orders. Moreover the fiction is mischievous as well as unnecessary. It proves a great deal too much; for if a ship of war were really a portion of the territory of the state which owns her, the health laws and port regulations of any other state could under no circumstances be applied to her, whereas we shall see, when we come to consider the immunities of public vessels in foreign ports,<sup>1</sup> that in them the local regulations about such matters must be obeyed.

With regard to *merchant vessels on the high seas*, International Law lays down that each state exercises jurisdiction over its own, and possesses no authority over those of other nations, except that in time of war its cruisers may search them and capture any whose proceedings justify seizure under the laws which regulate the conduct of neutrals. Jurisdiction over the vessels involves jurisdiction over all persons and things on board, including foreigners whether seamen or passengers. And this power carries with it a corresponding responsibility. A state is bound to give redress in its courts for wrongful acts done on board its merchant vessels on the high seas against foreigners, and is responsible for the acts of any such ship if it does what is illegal by International Law, except in the case of Piracy which is justiciable by every state, and of those offences against neutrality which belligerents are permitted to deal with themselves.

The question of a state's exclusive jurisdiction over its merchant vessels was involved in the quarrel between Great

<sup>1</sup> See § 129.

Britain and the United States at the beginning of the present century. It arose out of the claim of the former to take British seamen from American vessels on the high seas and impress them for the royal navy. The matter was complicated by a dispute concerning the doctrine of inalienable allegiance; for some of the seamen forcibly taken were naturalized American citizens, whom the British Government regarded as still possessed of their original nationality. The main point at issue, however, was whether one state had a right to execute its laws within the merchantmen of another engaged in navigating the open ocean. To this all other questions were subsidiary. Side issues arose, such as the pressing need of Great Britain for seamen, her right to call upon all her subjects for aid in the great struggle with Napoleon, the provocative conduct of some American skippers who hovered outside British ports and made their vessels places of refuge for British deserters, the extent of the right of search, and the theory of the indelible character of citizenship; but the kernel of the controversy was the question of jurisdiction. There can be no doubt that Great Britain was wrong. Her claim was in direct conflict with admitted principle.<sup>1</sup> It led to the War of 1812 between the two kindred nations; but the Treaty of Ghent, which closed the struggle in 1814, was silent as to the matter in dispute. After the great European peace of 1815 Great Britain gave up the practice of impressing seamen for her navy, and thus incidentally removed all chance of a renewal of the conflict. In 1842 Mr. Webster declared in his correspondence with Lord Ashburton that the United States would not in future allow seamen to be impressed from American vessels. The claim of right has never been formally abandoned by the British Government; but modern English writers regard it as indefensible, and it is not likely to be revived.<sup>2</sup>

<sup>1</sup> Phillimore, *Commentaries*, Pt. III., Ch. xviii.

<sup>2</sup> Wharton, *International Law of the United States*, § 331; Wheaton, *History of the Law of Nations*, Pt. IV., § 35.

## § 121.

Our third fundamental rule is that A STATE HAS LIMITED JURISDICTION OVER ITS SUBJECTS ABROAD. This jurisdic-

A state has Jurisdiction over its subjects abroad.

tion is personal, and it cannot as a rule be exercised unless the subjects in question come within the territorial or maritime jurisdiction of the state to which they belong. All civilized powers regard as punishable at home grave political offences against themselves committed by their subjects while resident abroad; and sometimes the more heinous crimes are looked upon in the same way, if they have not been already dealt with by the state in whose territory they took place and if the criminals are not subject to extradition. Crimes committed by subjects on board foreign vessels are placed in the same category with crimes committed on foreign territory. The jurisdiction claimed in these cases is a mixture of the personal and the territorial. It is personal in that the authority to take notice of the act and regard it as a crime is derived from the personal tie of allegiance subsisting between the doer and the state; it is territorial in that no arrest can be made or punishment inflicted until the offender has come within the state's territory or on board one of its vessels. Instances of purely personal jurisdiction are to be found when a state authorizes the establishment of a magistracy in barbarous districts bordering on its possessions but neither owned nor protected by any civilized power. Magistrates so appointed have a personal jurisdiction over subjects of the state who may be in the district assigned to them, but they can have no jurisdiction over others, seeing that they can claim no territorial authority. They are simply sent out into the wilderness to see that their fellow-citizens behave with a reasonable amount of propriety. Their authority is an emanation from the personal jurisdiction of the state over all its subjects wherever they may be; and it is capable of exercise in places outside the dominions or protectorates of

any civilized power, because no territorial jurisdiction exists there to override it. A good example of the assumption of such authority is to be found in the British Order in Council of Aug. 13, 1877, whereby Great Britain set up courts having authority over her subjects in a large number of places and islands in the Western Pacific, "the same not being within Her Majesty's dominions and not being within the jurisdiction of any civilized power." But foreigners were not to come under the jurisdiction thus assumed unless they filed in court a written consent obtained from the competent authorities of their own nation.<sup>1</sup>

## § 122.

We now come to the fourth and last of our fundamental rules. It is that A STATE HAS JURISDICTION OVER ALL PIRATES SEIZED BY ITS VESSELS. Piracy is an offence against the whole body of civilized states, not against any particular one of them.

A state has Jurisdiction over all pirates seized by its vessels.

It is a crime by International Law which defines it,<sup>2</sup> and provides that the death-penalty may be inflicted upon those who are guilty of it. It is invariably connected with the sea, which is under no territorial jurisdiction, and it is justiciable by any state whose cruisers can capture those who are guilty of it. An act to be piratical must be *An act of violence adequate in degree*; but it need not necessarily be an act of depredation. Generally a pirate is merely a robber of the vulgarest and cruelest kind; but there have been cases in which acts done by unauthorized persons for political ends have been regarded as piratical, though the *animus furandi* was wanting and there was no thought of indiscriminate aggression upon vessels of all nations. A single act of violence will suffice, such, for instance, as the successful revolt of the crew of a vessel against their officers. If they

<sup>1</sup> Hertslet, *Treaties*, XIV., 871-909.

<sup>2</sup> Wheaton, *International Law* (Dana's ed.), 193, note 83.

take the ship out of the hands of the lawful authorities, they become pirates, though if their attempt fails and lawful authority is never superseded on board, they are guilty of mutiny and not piracy. Another mark of a piratical act is that it must be *An act done outside the territorial jurisdiction of any civilized state*. Piracy must always be connected with the sea, but it may be committed by descent from the sea as well as actually upon it. Landing on an unappropriated island and robbing civilized people who had been cast ashore there, or were engaged in trade or missionary work among the natives, would be piracy if done by the crew of an unauthorized sea-rover. Hall seems to hold that a descent from the sea on the coast of a civilized state to rob and destroy without any national authorization would be accounted a piratical act ;<sup>1</sup> but surely the fact that the crime was committed within territorial jurisdiction would make the perpetrators amenable to the law of the state, not to the provisions of the international code. The last mark of a piratical act is that it must be *An act the perpetrators of which are destitute of authorization from any recognized political community*. Acts which when done under national authorization are lawful hostilities, are piracy when done without such authorization ; and the presence of two or more incompatible authorizations is deemed to have the same effect as the absence of any. Thus if in time of war a vessel obtains a commission from each belligerent and depredates impartially upon the commerce of both, she is a pirate. But a cruiser which, having a lawful commission, goes beyond its terms and makes captures not authorized by the laws of war, is no pirate ; for she has not thrown off national authority, and the state which owns her is responsible for her misdeeds. A commission from a community which has received Recognition of Belligerency but not Recognition of Independence is sufficient authorization for such acts of violence as are allowed to belligerent cruisers.

<sup>1</sup> *International Law*, § 81.



But if the community fails in its struggle and ceases to exist as a separate political unit, its commissions are no longer valid and acts done under cover of them become piratical because they are unauthorized. These points were well illustrated by the career of the Confederate cruiser *Shenandoah* at the close of the great American civil war. She was in the Antarctic seas when Richmond fell and the Confederacy came to an end in the spring of 1865. Through the summer she continued to make depredations on American vessels around Cape Horn. But when her captain gave up his ship to the port authorities at Liverpool in November, he asserted that he was ignorant of the extinction of his government till Aug. 2, and that as soon as he obtained the news he desisted from further hostilities. The British Government believed his story and allowed him and his crew to go free, while the vessel was given up to the United States.<sup>1</sup> There was some doubt at the time with regard to the facts, but none as to the law. Had it been clear that captures were made with full knowledge of the downfall of the Confederacy, the *Shenandoah* would certainly have been a pirate.

It has been argued that even though a revolted political community has not obtained Recognition of Belligerency, its commissions must be held to protect those who act under them at sea from the charge of being pirates.<sup>2</sup> But the case of the *Huascar* seems to point to the opposite conclusion. In 1877 this vessel, whose after career was to be so checkered and glorious, revolted from the government of Peru, and while on a short voyage stopped two British vessels on the high seas and took coals from one and Peruvian officials from the other. There was no political organization at her back, no provisional government to give her a commission; no province was in insurrection; no other ship even took up her cause. She was solitary in her movement; and the Peruvian Government disclaimed responsibility for her acts. Under such circumstances Recognition of Belligerency was

<sup>1</sup> British State Papers, *British Case presented to the Geneva Arbitrators*, 156-160.    <sup>2</sup> Hall, *International Law*, § 81.

out of the question ; and the *Huascar* could only be regarded as an unauthorized rover of the seas. The English admiral on the Pacific station declared that she was a pirate, at least as far as British subjects and property were concerned. He endeavored to capture her, but failed ; and the vessel surrendered to a Peruvian squadron. The British Government approved the conduct of Admiral de Horsey in the face of a remonstrance from Peru and a debate raised by the opposition in the House of Commons.<sup>1</sup> They were asked whether they would have hanged the officers and crew of the *Huascar* if they had caught them. The answer is that they would have done nothing of the kind. But a refusal to inflict the full penalty for an offence does not prove that it has not been committed. Technically the *Huascar* was a pirate.<sup>2</sup> Practically she differed *toto coelo* from the ordinary robber of the seas. Had she been captured, her crew would have been tried and in all probability found guilty, and then have been dismissed with a merely nominal punishment. Technical guilt and grave moral delinquency are not always conjoined, even in the administration of ordinary Criminal Law ; and there is no cause for wonderment or hostile criticism if in International Law there is sometimes witnessed a similar divorce of two things which are ordinarily most closely connected. Piracy is committed when the three marks we have described co-exist. An act to be piratical must be an act of adequate violence, it must be committed outside the jurisdiction of a civilized state, and it must possess no national authorization.

<sup>1</sup> British State Papers, *Peru*, No. 1 (1887) ; *Hansard*, 3d Series, Vol. CCXXXVI., 787-802.

<sup>2</sup> It would have been possible to justify the proceedings against the *Huascar* without raising the question of piracy. Such a vessel might be prevented by force from interference with the trade of third parties, and yet be free from attack as long as she did not molest them, whereas an ordinary pirate would be attacked by any cruiser who felt herself strong enough to make the capture. (See the author's paper in the *Journal of the Royal United Service Institution* for January, 1897.)

## § 123.

We must now distinguish between Piracy *jure gentium* which has just been described, and offences which are designated as Piracy by Municipal Law and by Municipal Law only. Each state by virtue of its independence can regulate its criminal code in the way which seems best to it; and if it chooses in the exercise of its discretion to regard certain offences as Piracy which are not so regarded by International Law, it is acting within its rights. Such laws bind the tribunals of the state which makes them and have coercive force within its jurisdiction, but no further. Even if the laws of other countries contain similar provisions, each law can take effect only within the sphere of the authority which sets it. Without special agreement among states, none can arrest or punish subjects of the others for offences committed outside its own jurisdiction, even though they are regarded as offences by the law of the state to which the offender belongs. This is so clear that no attempt has been made to assume a kind of international jurisdiction over acts declared to be piracy by Municipal Law, except in the one case of the slave trade. In her zeal for its suppression Great Britain instructed her cruisers to stop vessels of all nations suspected of being engaged in it. In 1841, the United States complained of the molestation of American merchantmen; and Lord Palmerston and Lord Aberdeen, who were Foreign Secretaries successively in the latter half of 1841, disclaimed any Right of Search in time of peace, but insisted upon a Right of Visit in order to discover "whether the vessel pretending to be American and hoisting the American flag be *bonâ fide* American." They admitted that in such cases the vessel must be allowed to proceed, even if she was a slaver, but argued that, should she turn out to be a ship of some country with which Great Britain had a treaty providing for mutual search and capture, she could be proceeded against accord-

Distinction between Piracy by the law of nations and Piracy by Municipal Law.

ing to its stipulations. Mr. Webster in reply pointed out that there was no distinction recognized by the writers on International Law between a Right of Visit and a Right of Search. He argued that a right to inquire into the real nationality of the vessel visited must, if it were to be effective, include a right to examine her, detain her and overhaul her papers. This was what was usually understood by the Right of Search, which was a purely belligerent right and could not be exercised in time of peace. If the claim put forward did not include search, it amounted to no more than a right of approach and inquiry, which was admitted as an incident of the free use of the ocean, with the proviso that the ship thus dealt with was not bound to lie by and await the approach. The Treaty of Washington of 1842 put an end for a time to the controversy. It provided that each country should maintain a naval force on the coast of Africa "to enforce separately and respectively, the laws, rights, and obligations of each of the two countries for the suppression of the slave trade."<sup>1</sup> But in 1858 the question cropped up again owing to the examination of some American ships by British vessels off the island of Cuba. The United States Government at once made complaints; and Lord Malmesbury, who was then Foreign Secretary of Great Britain, abandoned the claim on the advice of the law officers of the crown.<sup>2</sup> This incident may be held to have put beyond possibility of doubt the doctrine that, agreement apart, there is no Right of Search in time of peace, even for such an excellent purpose as the putting down of the slave trade.

§ 124.

The suggestion of the United States made in 1823 that the slave trade should be declared Piracy *jure gentium* by

<sup>1</sup> *Treaties of the United States*, p. 436.

<sup>2</sup> Halleck, *International Law* (Baker's ed.), II., 268-282; Wharton, *International Law of the United States*, § 327.

the consent of the civilized world was never carried into effect. The only practical course, therefore, for those states who desired to put down the traffic was to adopt the British policy of entering into treaty engagements with other powers for the concession of a mutual Right of Search, so that cruisers of one party might have the right to stop, examine, and if necessary seize and bring in for trial, merchantmen of the other suspected of being slavers. But considerations of the sanctity of the flag as the emblem of the national sovereignty, and a feeling that the Right of Search was in its nature odious and should be kept within the strictest limits, often prevailed over the interests of humanity; and Great Britain had great difficulty in securing the general recognition of her views. The two powers most hard to satisfy were the United States and France. The former would not concede the point of mutual search till 1862, and her treaty of that year with Great Britain confined it within narrow geographical limits.<sup>1</sup> The latter denounced in 1845 her Conventions of 1831 and 1833 on the ground that they allowed search, and would consent to nothing more than the maintenance of a squadron on the coast of Africa to co-operate with British cruisers for the purpose of suppressing the trade. The result was that the traffic in slaves flourished under the protection of the French flag. Arab dhows could easily obtain from a French Consul a license which conferred upon them a French nationality. They were then safe from capture even if their decks were crowded with slaves. The utmost a British officer could do, and this rather on sufferance than by right, was to send a boat and demand to have the ship's papers shown over the side of the vessel. If they appeared to be in proper form, he was obliged to let her pass unmolested, because the flag she flew protected her from search and seizure. The abolition of slavery in the various American Republics, and in Cuba, has put an end to the West African

The Slave Trade  
not Piracy by the  
law of nations.  
Attempts to put it  
down by treaty.

<sup>1</sup> *Treaties of the United States*, p. 455.

slave trade ; but the traffic still flourishes on the east coast of Africa, though it is beginning to feel the effect of the vigorous measures taken in late years to suppress it. The last and most far-reaching of these is the great International Convention of 1890, which was the Final Act of a Conference of representatives of all civilized powers called by Belgium at the suggestion of Great Britain.<sup>1</sup> Difficulties arose with regard to its ratification. The French legislature demurred owing to the modified Right of Search granted by it, and the Senate of the United States took the ground that it did not wish America to be mixed up in European and African arrangements. But the various objections have been overcome or reserved for future settlement. France ratified in January, 1892, on the understanding that the maritime measures were subject to ulterior modification ; and the Senate of the United States sanctioned the agreement in February of the same year, appending to its formal ratification a declaration that it did not thereby express approval of the protectorates and other territorial arrangements referred to in the clauses. By the middle of 1892 the Convention had received the formal assent of the civilized world.<sup>2</sup>

This important international agreement attacks the evil on land as well as at sea, and thus marks a new epoch in the history of the attempts to destroy the slave trade. It is a most elaborate document, divided into chapters and sections, and a large part of it would have been impossible had not the interior of Africa been opened to the influence, and in some degree to the dominion, of civilized powers. We can give but a very brief outline of its provisions. It stipulates for measures of repression to be carried out by each of the signatory powers, in the African territory over which it possesses either sovereignty or a protectorate. Stations and fortified ports are to be established from time to time as the

<sup>1</sup> British State Papers, *Africa*, No. 7 (1890).

<sup>2</sup> *Ibid.*, *Treaty Series*, No. 7 (1892).

country is opened up, and armed cruisers are to be placed on inland lakes and navigable waters. The importation and sale of firearms and ammunition is to be put under stringent restrictions in a zone extending over the greater part of the continent and including the islands within a hundred miles of the coast. Within this zone the traffic in intoxicating liquors is to be prohibited or severely restricted. Such of the signatory powers as allow domestic slavery are to prohibit the importation into their territories of African slaves. A great International Information Office is to be established at Zanzibar, with branches at other African ports: and in it are to be concentrated documents of all kinds with regard to the progress of the work of exterminating the slave trade under the Convention, while by means of it a constant interchange of information is to take place between the powers concerned. With regard to measures of repression connected with the sea, a great Maritime Zone is created, covering the western part of the Indian Ocean from Madagascar to the coasts of Beloochistan. Within this zone a very limited Right of Search is granted to one another by the signatory powers. Vessels suspected of being engaged in the traffic are to be handed over to a court of their own country for trial; and in case of condemnation the slaves are to be set at liberty and the captain and crew punished according to their offence. Native vessels are not to receive authorizations to carry the flag of one of the contracting parties for more than a year at a time, and their owners must be subjects of the power whose flag they apply to carry, and enjoy a good character, especially as regards the slave trade. The authorization is to be forfeited at once if acts or attempted acts of slave trading are brought home to the captain or owner. Lists of the crew and of negro passengers are to be delivered at the port of departure by the captain of the vessel to the authority of the power whose flag it carries, and the authority is to question both seamen and passengers as to the voluntary nature of their engagement.

These lists are to be checked at the port of destination and at all ports of call. Certified copies of all authorizations and notices of the withdrawal of authorizations are to be sent to the International Information Office at Zanzibar. Slaves detained on board a native vessel against their will can claim their liberty, and any slave taking refuge on board a vessel bearing the flag of one of the signatory powers is to be set free.

There can be no doubt that these provisions are calculated to strike a harder blow at the African slave trade than any it has hitherto received. Many of them must be regarded for the present and for some time to come more as counsels of perfection than as imperative commands. No power can patrol the whole of such immense and largely unexplored regions as have lately been appropriated in Africa by various states. But trade, and with it geographical knowledge and power of control, is advancing with great rapidity, and we may fairly demand that serious efforts to put down the capture of slaves in the interior will follow in its wake. It would be too great a strain upon credulity to be expected to believe in the sincerity of one or two of the contracting parties. As long as a demand for slaves exists in Turkey, Turkish officials will connive at its supply in spite of the treaty engagements of their country. The difficulty of eradicating domestic slavery from Oriental society is enormous, and till the task has been completed the slave trade will not entirely cease. Another barrier to success is found in the hysterical sentiment which deems the national flag dishonored should search be made beneath it by agents of another power, even though in consequence of their abstention it is used to cover the foulest of human wrongs. Probably the railway will be a more potent agent in the eradication of the evil than any international agreement. It will develop legitimate trade; and when the Arab slave hunters find that far more profit is to be made from it than from kidnapping their fellow-creatures, they will leave their cruel pursuit for



other and more legitimate avocations. But the possibility of the gradual extinction of the slave trade in the future does not absolve civilized states from the duty of abating it in the present. They are morally bound to use all the means in their power for the diminution of so great a curse; and it is to be hoped that the pressure of enlightened opinion will keep every government to the strenuous performance of the duties it has undertaken by signing the great anti-slavery Convention.

### § 125.

We have now gone through the general and admitted rules as to a state's jurisdiction, with the exception of those which concern the powers exercised by belligerents over neutral individuals to restrain and punish violations of the rules laid down by the law of neutrality. These will be best discussed when we come to that portion of our subject. But before we pass on to the exceptions to ordinary jurisdictional rights, we must consider a class of cases in which jurisdiction is sometimes assumed by states, though it is to say the least very doubtful whether they are justified in doing so. There are provisions in the laws of many countries whereby certain crimes committed by foreigners within foreign jurisdiction are made justiciable in their courts. Thus France, Germany and Austria punish foreigners who have committed abroad crimes against the safety of the French, German or Austrian state; and some powers, such as Russia and Italy, go further and punish offences against their individual subjects, such as murder, arson, and forgery, though committed in a foreign country by persons of foreign nationality.<sup>1</sup> Of course the offenders cannot be tried and punished unless they come within the territory of the aggrieved state. But we may

The claim to jurisdiction over foreigners for offences committed abroad.

<sup>1</sup> For the law of most civilized nations on this subject, see the Report of the American Department of State on *Extraterritorial Crime and the Cutting Case*, pp. 38-53.

well share the doubts of Wheaton,<sup>1</sup> Hall,<sup>2</sup> Westlake,<sup>3</sup> and other authorities as to the existence of any right of jurisdiction in such cases. A state has authority over foreigners within its territory, not over foreigners abroad. An attempt to punish an alien within the territory for an offence committed before he came to it is an attempt to exercise jurisdiction over acts done in another state, and is thus contrary to the very principle of territorial jurisdiction on which it is nominally based. In similar cases a state can punish its own citizens; but its right to do so is based upon the personal claim it has to their allegiance wherever they may be. There is no personal tie in the case of aliens; and it may justly be contended that any attempt to exercise over them such jurisdiction as we are considering would give good ground for remonstrance from the state of which they were subjects. If the offences in question are grave crimes, the perpetrators may be surrendered by extradition to the authorities of the country where the wrong was done. If they are small matters, there is no need to notice them. It is true that most states refuse to extradite political offenders; but diplomatic complaint will usually secure the exercise on the part of a government of watchfulness to prevent its soil being made the scene of conspiracies against the political institutions of other countries. In any case an occasional failure of justice is preferable to putting the subjects of every state at the mercy of the law and administration of its neighbors. This view has been pressed and acted upon in several recent cases, notably in the controversy between the United States and Mexico with regard to Mr. Cutting, who was arrested and imprisoned in Mexico in 1886 for an alleged offence committed in Texas against a Mexican citizen. The Government of Washington demanded his release, which was granted after some delay. From the vigorous action taken by the American authorities on this occasion,

<sup>1</sup> *International Law*, § 113.

<sup>2</sup> *International Law*, § 62.

<sup>3</sup> *Annuaire de l'Institut de Droit International for 1880*, pp. 50 et seq.

it is evident that the United States is deeply committed to the view we have ventured to enunciate.<sup>1</sup>

### § 126.

It will be remembered that, when we claimed for a state jurisdiction over all persons and all things within its territory, we stated that there were a few exceptions. We will now proceed to enumerate them. First among those who when in a foreign country are not subject to ordinary rules come

#### *Foreign sovereigns and their suites.*

When the head of a state is visiting a foreign country or travelling through it in his official capacity, he and his effects are exempt entirely from the local jurisdiction. He cannot be proceeded against civilly or criminally and his immunities in this respect are shared by his attendants. If he conspires against the state, or permits his suite to do any acts against its safety, or harbors criminals and refugees in the residence assigned to him, he may be sent out of the territory, but he cannot be tried and punished within it. He may not, however, exercise any jurisdiction of his own within the state he is visiting. If any serious and urgent cases arise among his retinue, they must be sent home for trial. All immunities vanish, should a sovereign travel *incognito* as a private person; but he can at any time regain them by appearing in his official character. If the same person is both ruler and ruled, as the present Duke of Edinburgh is sovereign in Saxe-Coburg-Gotha and subject in England, he would not be allowed to escape from any obligations that might accrue to him while resident in the country in which he was subject by pleading that he was sovereign in another country.

Exceptions to ordinary rules about Jurisdiction. (1) Foreign sovereigns and their suites.

<sup>1</sup> Report of the Department of State on *Extraterritorial Crime and the Cutting Case*, 1887.

## § 127.

Next in our list of those who are free from local jurisdiction come

*Diplomatic agents of foreign states.*

When an accredited representative of a foreign power is residing in the country to which he is sent, or travelling through it or any other friendly country on his way to or from his post, he and his effects are in the main free from the local jurisdiction. The members of his official suite have similar immunities; and the inviolability attached to the person of the ambassador is held to extend itself to his wife and children, and to those members of his household who, though not possessed of the diplomatic character, are necessary for his convenience and comfort. We shall discuss the question of diplomatic immunity at some length when we come to deal with the subject of Legation and Negotiation; but we allude to it here in order to show that the privileges accorded to ambassadors are exceptions to the ordinary rules concerning state authority.

Exceptions to ordinary rules about Jurisdiction. (2)  
Diplomatic agents of foreign states.

## § 128.

Among those whose privileged position entitles them to exemption from the jurisdiction of a friendly power when they come within its territory, we must give a prominent place to

*The public armed forces of foreign states.*

We will first consider the case of land forces and then discuss the extent of the immunities of sea forces. It is necessary to separate the two because the rules with regard to them differ. The universally recognized rule of modern times is that a state must obtain express permission before its troops can pass through the territory of another state, though the

Exceptions to ordinary rules about Jurisdiction. (8)  
Public armed forces of foreign states.

contrary opinion was held strongly by Grotius<sup>1</sup> and his views continued to influence publicists till quite recently. Permission may be given as a permanent privilege by treaty for such a purpose as sending relief to garrisons, or as a special favor for the special occasion on which it is asked. The agreement for passage generally contains provisions for the maintenance of order in the force by its own officers, and makes them, and the state in whose service they are, responsible for the good behavior of the soldiers towards the inhabitants. In the absence of special agreement the troops would not be amenable to the local law, but would be under the jurisdiction and control of their own commanders.

With regard to ships of war, no special permission is required before they can enter the ports of a friendly state. Freedom of entry is assumed unless the local sovereign makes an express declaration to the contrary, which he can do on assigning good reasons. But in case of war he must treat both belligerents alike, and not admit the vessels of one while excluding those of the other. Exclusion is, however, very rare. The tacit permission to enter implied by the absence of any attempt to prevent entry is freely accorded, and is now held to carry with it a more or less complete exemption from the authority of the local sovereign. The accepted principle of modern times is that jurisdiction is waived when entry is allowed. But it must be admitted that this broad doctrine is of recent growth. In 1794 Attorney-General Bradford gave an opinion in the case of a British sloop of war, out of which six American citizens were taken by the local authorities while she was lying in the harbor of Newport, Rhode Island. On the case being referred to him by the Government of Washington, he replied that "the laws of nations invest the commander of a foreign ship of war with no exemption from the jurisdiction of the country into which he comes."<sup>2</sup> A similar opinion was

<sup>1</sup> *De Jure Belli ac Pacis*, II., II., xiii.

<sup>2</sup> *Opinions of Attorneys-General of the United States*, I., 47.

given in 1799 by Attorney-General Lee in the case of the British packet *Chesterfield*, as to which he declared, "It is lawful to serve civil or criminal process upon a person on board a British ship of war lying in the harbor of New York,"<sup>1</sup> and argued that due respect to the country visited involved obedience to such process. These views were by no means confined to American lawyers. They seem to have been held by authorities of the highest repute in England. Thus in 1820 Lord Stowell was asked by the British Government for an opinion upon the case of John Brown, a British subject who, having escaped from a prison into which he had been thrown by the Spaniards for aiding their revolted American colonies, took refuge on the British warship *Tyne*, lying in the harbor of Callao, and claimed the protection of the flag. In his reply the great English jurist not only declared that the captain of the British vessel had no right to protect Brown, but added "I am led to think that the Spaniards would not have been chargeable with illegal violence, if they had thought proper to employ force in taking this person out of the vessel."<sup>2</sup>

Such doctrines as these would reduce the immunities of a public vessel almost to vanishing point. They would never probably have been acquiesced in on the continent of Europe, and even while they were being uttered in England and America a strong counter-current of opinion made itself manifest in quarters entitled to the utmost respect. Thus in 1810 Chief Justice Marshall, in delivering the judgment of the Supreme Court of the United States in the famous case of the *Exchange*,<sup>3</sup> took occasion to discuss the whole subject of the exemption of public ships in foreign ports from the local jurisdiction. He placed permission to enter upon the ground of implied license, and, after pointing out that a ship of war could not do her duty to her

<sup>1</sup> *Opinions of Attorneys-General of the United States*, I., 91.

<sup>2</sup> Halleck, *International Law* (Baker's ed.), I., 188.

<sup>3</sup> Cranch, *Reports of the U.S. Supreme Court*, VII., 116.

sovereign if she were subject to the interference of another authority, he went on to say, "The implied license, therefore, under which such a vessel enters a friendly port may reasonably be construed, and it seems to the court should be construed, as containing an exemption from the jurisdiction of the sovereign within whose territory she claims the rites of hospitality." On this great judgment the doctrine now most widely held both in America and in Great Britain is based. In 1855 during the Crimean War the British cruiser *President* captured a Russian vessel called the *Sitka* and brought her into the harbor of San Francisco with a prize-crew on board. The local courts issued a writ of *Habeas Corpus* to try the validity of the detention of two of the prisoners. Process was served, but the commander of the *Sitka* immediately departed without obeying it. The opinion of Attorney-General Cushing was taken upon the case. He commended the captain for departing and thus avoiding unprofitable controversy, and took occasion to say that the courts of the United States had "adopted unequivocally the doctrine that a public ship of war of a foreign sovereign at peace with the United States, coming into our ports and demeaning herself in a friendly manner, is exempt from the jurisdiction of the country."<sup>1</sup> This view is shared by British and American writers of repute and by almost all the international jurists of Continental Europe. Indeed it may be said to have been adopted by the publicists of the civilized world. Ortolan, the only one among them who by reason of his career as a naval officer is able to speak from practical experience, is most emphatic in his assertion of immunity.<sup>2</sup> This consensus of opinion outweighs entirely the views of a few great English lawyers and one or two continental jurists who still cling to the ancient doctrine; and recent practice is in entire accord with it. Ships of war everywhere claim and everywhere receive exemption

<sup>1</sup> *Opinions of Attorneys-General of the United States*, VII., 122.

<sup>2</sup> *Diplomatie de la Mer*, Livre II., Ch. X.

from the local jurisdiction. If International Law is to be deduced from practice, the controversy on this point is at an end.

### § 129.

But though exemption is the general rule, we shall find on an examination of the usages of states that it is not absolute and complete. Being based upon convenience it is limited by convenience; and extreme inconvenience would obviously result if ships of war in foreign ports were at liberty to disregard ordinary harbor regulations and sanitary precautions. The local authorities can enforce all reasonable health and port regulations; and, if the visiting vessel is a belligerent, they may compel it to observe neutrality regulations, and may detain and try any prizes it has brought into the port, should there be good reason to believe that the captures were made in violation of their neutrality. It is further clear that a state may prevent the cruisers of another state from enforcing their revenue laws in its waters. These exceptions to the ordinary rule are amply sufficient to demonstrate the falsity of the theory that a ship of war is for all legal purposes a floating portion of the territory of the state to which she belongs. If she were anything of the kind, she could in no way be made amenable to the local jurisdiction.

Exemption of public vessels of one state in the territorial waters of another not absolute and complete.

### § 130.

The immunities granted to public vessels while lying in the territorial waters of friendly states ought not to be abused. A ship of war is a floating fortress charged with the duty of protecting the interests of her country wherever she may be sent. To turn her into an asylum for fugitive criminals is a gross perversion of the purpose for which she was commissioned by her own sovereign, as well as a gross insult to the sovereign in whose waters she is staying. Any captain proved

The case of political offenders and fugitive slaves.



to be guilty of it ought to be dismissed from the service without ceremony. Even when a criminal has succeeded in taking refuge on board without the connivance of the commander, he should, if possible, be given up on demand unless his offence be political. But the demand should be made diplomatically, not to the captain, who has no authority to hold an extradition court on board his vessel and decide whether the alleged offender should be surrendered or not. Still less should any attempt be made by the local authorities to arrest the fugitive on board the foreign vessel of war. They have no power to enforce their law under its flag, and a commander who in such a case repelled force by force would be acting within his duty. The best course to take when a fugitive criminal is found on board, is to expel him at once. He can be turned out of the vessel into which he entered without right, though the captain cannot suffer him to be arrested while on board or entertain any demand for his surrender; and when he has been set on shore, the local authorities can deal with him. Political offenders are held to differ from ordinary criminals, and the great preponderance of modern opinion and practice is in favor of their reception. But even in their case the commanders of public vessels are bound to refrain from offering asylum and aiding escape. If a political refugee in danger of losing life or liberty is able to reach a foreign man-of-war lying in the waters of the country whose authorities are seeking to secure him, he may be allowed to come on board, and must be protected against arrest. This is the rule of Great Britain and America, and most civilized states concur in it. It applies also to the case of a political offender who escapes to some other country, and, having come on board in its waters, is taken by the vessel into a port of the country in which his offence was committed. But it should be noted that merchant vessels can offer no asylum to offenders of any kind. However unjust the local law may be, however tyrannical the government, however laudable resistance to its au-

thority, no safe place of refuge can be found on board a foreign merchantman in its ports. The local law applies to them; they are under the local jurisdiction; and the local authorities may enter them and arrest any of their subjects they may find there. But in November, 1893, when the *Costa Rica*, an American mail steamer, was fired upon at Amapala, Honduras, because her captain refused to deliver up General Bonilla, a political refugee who was a passenger on board, the United States protested against the act as wanton and illegal, and demanded an apology. The Government of Honduras promptly disavowed the conduct of its officers and expressed sincere regret at the occurrence.<sup>1</sup> This case tends to show that, in the opinion of at least one of the great powers of the world, a private vessel may not be fired upon under the circumstances indicated, though she may be searched and must submit to have the refugee taken out of her.

The case of fugitive slaves has raised a considerable amount of difficulty, especially in Great Britain. There can be no doubt that during the prevalence of that older view of the law which reduced to very small proportions the immunities of public vessels in foreign waters, slaves who escaped to British vessels lying in the ports of countries where slavery was legal were given up to the local authorities.<sup>2</sup> But the growth of opinion in favor of the modern doctrine of exemption except for a few well-defined purposes coincided with the deepening of the feeling against slavery; and a great outcry arose in England when in 1875 it was discovered that the British Admiralty had issued a circular directing captains of the Queen's ships to surrender fugitive slaves who came on board their vessels in the territorial waters of states which authorize slavery. The Government appointed a Commission to investigate the subject; and, after receiving its report, withdrew the first circular and published a second, which directed naval officers in the circumstances

<sup>1</sup> *Statement issued by the Department of State, Nov. 12, 1893.*

<sup>2</sup> *Report of the British Fugitive Slave Commission, 1875.*

just described not to receive a slave on board unless his life was in manifest danger, and not to keep him on board after the danger was passed, but to entertain no demand for his surrender nor enter into any examination as to his *status*.<sup>1</sup> This placed the larger part of the burden of responsibility on the captains who had to deal with the cases; but it made clear the adhesion of Great Britain to the doctrine of the immunity of the public vessel from local authority, which had been strenuously maintained by the international lawyers who were members of the Commission and as strenuously denied by their colleagues. Though a state is forbidden, except in the cases we have enumerated, to execute its laws on board foreign men-of-war lying in its harbors, it is not left without remedies if it deems itself aggrieved by the proceedings of such vessels. It can demand the extradition of the fugitives, it can complain diplomatically, it can order the offending vessel to quit its waters, and it can refuse to receive into its ports in future any public vessels of the same nationality.

The immunities of which we have been speaking do not follow the members of the ship's company when they land. In their ship and in its boats, which are appurtenant to it and share its privileges, they are exempt from the local jurisdiction; but the moment they set foot on shore they come under the authority of the state, and may be arrested and tried like other foreigners if they commit crimes or create disturbances.

### § 131.

The remaining exception from ordinary rules with regard to territorial jurisdiction occurs in the case of

*Subjects of Western states resident in Eastern countries.*

It rests on special agreement, and not, like those we have been considering hitherto, on the common law of nations.

<sup>1</sup> *British Fugitive Slave Circular of Dec. 5, 1875, § 93 C.*

It is insisted upon owing to the defective character of Oriental administration of justice and the dependent position assigned to Christians by the sacred code of Islam. In consequence of these considerations the Christian states have obtained by treaty exemption from the local jurisdiction for their subjects resident in Turkey, the Barbary States, China, Japan, Siam, and other parts of the East still remaining under native rule. By Conventions with these powers authority over Europeans and Americans resident within their territories is given to Consular Courts. Thus Consuls, who among the Western nations are merely commercial agents, exercise in Oriental states important judicial functions, and possess large immunities conferred on them for the protection of their countrymen. Their jurisdiction is both civil and criminal. The manner of its exercise depends on the law of the country to which each Consul belongs and on treaty stipulations between that country and others. Generally subjects of the local sovereign who may commit any crime against subjects of a foreign state resident in their country are dealt with by the local tribunals; but subjects of a foreign state who may be charged with criminal offences against natives are tried in the Consular Courts of their own nation. In cases which arise between subjects of different foreign nationalities the aggrieved person can, in the absence of special treaty regulations, seek redress in the Consular Court of the country whose subject has done the wrong; and if two subjects of the same foreign nation stand to one another in the relation of accuser and accused, the case is tried in the court to whose authority both of them are subject. In civil matters questions which arise between a foreigner and a native are generally settled by a tribunal in which agents of both the foreign and the native state have a voice. When two or more foreigners of the same nationality are the parties to the suit it is tried in their own Consular Court; and when the dispute is one between

Exceptions to ordinary rules about Jurisdiction. (4) Subjects of Western states resident in Eastern countries.

foreigners of different nations it goes to the Consular Court of the defendant's country. As a rule there is an appeal in civil cases of great importance to the superior tribunals of the Consul's country; and in criminal cases the highest sentences cannot be passed without the ratification of the home authorities. Sometimes it is arranged that persons charged with grave crimes should be sent home for trial. In order to gain the protection of a Consul in the East it is necessary for subjects of the state he represents to register themselves at the Consulate. Registration of the head of a family implies registration of all members of the family living under the same roof. Throughout the Turkish Empire England has a network of Vice-Consular and Consular Courts culminating in the Court of the Consul-General at Constantinople. Their authority, and the authority of her Consular Courts in other countries, is derived from the Foreign Jurisdiction Act of 1843 and Orders in Council made in pursuance of it. The authority of the Consular Courts of the United States rests upon an Act of Congress passed in 1860. But it must be noted that these acts and similar laws of other civilized and Christian powers could give no jurisdiction within the dominions of Oriental states, were it not for the treaties whereby the right to establish Consular Courts is expressly granted by the local sovereigns.<sup>1</sup> In Egypt the Consular system was superseded in 1876, after negotiations extending over nearly ten years, by a system of Mixed Tribunals commonly called International Courts. The judges of these courts are partly natives and partly foreigners, the majority always belonging to the latter category. Their powers and functions are regulated by an elaborate code; and the appointment of the judges rests with the Egyptian administration, which is, however, bound in selecting the foreign members of the courts to act on the recommendation of their respective gov-

<sup>1</sup> Note on Consuls in *Treaties of the United States*, pp. 1279-1285; Halleck, *International Law* (Baker's ed.), Ch. XI.

ernments. Fourteen powers, including the United States, have assented to these arrangements,<sup>1</sup> which are said to work much better than the old Consular Courts. They have been prolonged from time to time, the last occasion being in January, 1894.

There can be no doubt that abuses are likely to arise, owing to the large immunities given under the Consular system to subjects of Christian states in Oriental countries and the powerlessness of the local sovereign to enforce any authority over them. We have but to imagine a case in some remote district far from the influence of civilized public opinion, where the protected subject is a rascal and the local Consul careless or unscrupulous, to see what grave injustice might be done without the possibility of redress. Some states allow their Consuls to naturalize foreigners with great ease; and it is said that half the scoundrels of the Levant find it convenient to escape from the local jurisdiction in Morocco and the outlying parts of the Turkish Empire by obtaining some foreign nationality, under cover of which they cheat and plunder the natives with impunity. Too much care cannot be exercised by self-respecting Christian states in such matters. They must in the interests of their own people insist on some system of immunity; but they should not allow what is necessary to protect their subjects to become a means for the oppression of the subjects of the local sovereign. When countries hitherto governed by native rulers of the Oriental type pass under the sway of Christian and civilized powers, one of their first cares is to abolish the Consular Courts, so that they may become in reality masters in their own dominions; and the states who possess treaty rights to maintain such courts usually make no difficulty in renouncing them. Thus when France in 1881 established over the Tunisian Regency a protectorate which differed only in name from complete annexation, she commenced

<sup>1</sup> Holland, *The European Concert in the Eastern Question*, pp. 102, 103, 128-147.

negotiations with the powers who had what is called Consular Capitulations with Tunis, and was able in 1884 to supersede the Consular Courts by French judges.<sup>1</sup>

### § 132.

We have now to consider the subject of Extradition, which may be defined as *The surrender by one state to another of an individual who is found within the territory of the former, and is accused of having committed a crime within the territory of the latter.* Such surrenders are usually made in pursuance of

Extradition. A state is not bound to grant it in the absence of a treaty obliging it to do so.

treaty obligations, though there are not wanting cases where criminals have been given up in the absence of any stipulation on the subject. The earliest Extradition Treaty on record was negotiated about thirteen hundred years before Christ between Rameses II., King of Egypt (the Pharaoh who knew not Joseph), and Khitasir, King of the Khita. It provided for friendship and alliance between the two monarchs and for a strict return of fugitives from one another's dominions.<sup>2</sup> But the example set at so remote a period has not been followed to any extent till recent times. The great mass of Extradition Treaties date from the present century and even from its latter half. They have been rendered necessary by the rapid growth of intercourse between peoples and the great preponderance of opinion in favor of the doctrine that crime is in the main territorial.

Writers on International Law have differed greatly on the question whether a state is bound to surrender fugitive criminals unless it has contracted to do so by treaty. The majority of them favor the negative view, and the same may be said of statesmen and judges. Each state must decide for itself whether in the absence of treaty stipula-

<sup>1</sup> *Statesman's Year Book for 1894*, p. 523; Twiss, *Law of Nations*, I., § 66.

<sup>2</sup> Burgsch, *Egypt and the Pharaohs*, II., 71-76.

tions it will give up criminals or not ; but it is now generally admitted that a surrender is a matter of comity and not of right. There is no rule of International Law commanding governments to return to one another fugitives from justice on demand from the country where the crime was committed. The practice of states differs. In America it is held that in the absence of a treaty there is no law which authorizes the President to deliver up any one charged with having committed a crime in the territory of a foreign nation, or at least that there are grave doubts as to his right to do so.<sup>1</sup> Surrender was made in 1864 in the case of Arguelles, who was given up to the Spanish authorities for a crime of a peculiarly atrocious character, though there was then no Extradition Treaty with Spain ; and on that occasion the Senate interfered with a request to be informed under what authority of law or treaty the act was done. Mr. Seward, the Secretary of State, admitted in his reply that the United States was under no obligation to make the surrender, and justified his action on the grounds of comity and humanity. The attempts to stop the surrender failed, but the question of the power to make it was never judicially decided.<sup>2</sup> The law of England appears to be strongly against surrender. It is held that the common law gives the executive no power to arrest an alien and deliver him to a foreign state.<sup>3</sup> The Crown has a right to negotiate Extradition Treaties ; but their provisions cannot be brought into effect without statutory authority. The Extradition Act of 1870 gives the Crown power by Order in Council to carry into effect all Extradition Treaties made in accordance with its terms ; and in the United States Statutes passed in 1848 and 1860 enable the courts to act under duly proclaimed Extradition Treaties. Thus the two great English-speaking peoples have adopted practically the same principles in this im-

<sup>1</sup> Note on Extradition in *Treaties of the United States*, pp. 1289 and 1291.

<sup>2</sup> Wheaton, *International Law* (Dana's ed.), p. 183, note

<sup>3</sup> Clarke, *Extradition*, Ch. V.



portant matter. In France, on the other hand, the received legal doctrine is that the state authorities have an inherent right to surrender fugitive criminals if they think fit to do so, and the French view finds favor in most civilized countries. Even the United States and Great Britain do not hesitate to take advantage of it ; and ask foreign states with whom they have no agreements for extradition to surrender on the ground of comity fugitives whom they would not themselves give up were the positions of the countries reversed. Thus in October, 1893, the Government of Washington obtained from Costa Rica, between which country and America there is no Extradition Treaty, the surrender of a fugitive named Weeks who was accused of embezzlement within the United States.<sup>1</sup>

### § 133.

But these questions of the common law of nations and the limits of the executive authority of domestic governments are becoming year by year less important, owing to the almost universal adoption of Extradition Treaties and the greatly enlarged list of crimes which now find a place within them. One example will suffice to show the immense progress made in this latter matter within recent times. The Extradition Clauses of the Treaty of 1842 between the United States and Great Britain made mention of seven crimes for which surrender could be demanded, but to these seven the Convention of 1890 added twenty others.<sup>2</sup> It is now the usual custom to embody various conditions in Extradition Treaties and to refuse to give up an offender unless they are complied

The conditions  
generally inserted  
in Extradition  
Treaties.

<sup>1</sup> Stephen, *History of the Criminal Law*, II., 66 ; *Treaties of the United States*, note on Extradition, pp. 1289-1293 ; Wheaton, *International Law* (Boyd's ed.), §§ 116 a-116 c.

<sup>2</sup> *Treaties of the United States*, p. 437 ; British State Papers, *United States*, No. 1 (1890).

with. Reasonable *prima facie* evidence of the guilt of the accused is almost invariably insisted upon; and it is clear that great injustice might result if a state surrendered fugitives on the mere assertion of a foreign government that they were guilty of crime. The extraditing state does not claim to try the accused parties and find them guilty before it will give them up, but it requires sufficient evidence to satisfy its own tribunals that the cases are genuine and ought to be tried. Another condition generally laid down in recent treaties is that the individual demanded shall not be tried for any offence committed prior to his surrender, other than the extradition crime, until he has been liberated and has had an opportunity of leaving the country. The object of this proviso is to guard against the surrender of a person for one offence when the real reason for demanding him is to try him for another, possibly a political crime, possibly an offence not mentioned in the treaty. The condition is perhaps not unreasonable in view of the great divergencies of political condition and theory between some of the most powerful states of the civilized world, though it might easily operate in favor of a criminal whom it was eminently desirable to punish. It is embodied in the Treaty of 1890 between Great Britain and the United States, but it does not appear in the Treaty of 1842. The British Extradition Act of 1870 declared that it must be inserted in any Extradition Treaty put in force by the Crown. Under these circumstances the late Earl Derby, when Foreign Secretary in 1876, declined to surrender the forger Winslow and other fugitives, unless the American Government would give an undertaking that they should not be tried for any offence other than that for which their extradition was demanded. The United States declined to make stipulations and assurances not provided for in the treaty which then governed the situation. For some time neither side would give way and in consequence several fugitives from justice escaped surrender. But towards the end of the year the British

Government receded from its untenable position, and the American administration indicated that they were not disposed to try extradited offenders for any crime except that which had caused their surrender. The matter has been set at rest by the decision of the Supreme Court in the case of Rauscher, who was brought to trial for the cruel and unusual punishment of a sailor, his extradition having been obtained from Great Britain on a charge of murdering the same man. In 1866 the court quashed the proceedings on the ground that a fugitive extradited for one offence could not be tried for another until opportunity had been given him to return to the country which had surrendered him.<sup>1</sup> This decision and the Convention of 1890 have placed the matter as between the two nations beyond the slightest possibility of doubt.

The most important and most difficult of the conditions to be found in most modern Extradition Treaties is that which forbids surrender if the offence is of a political character. There is no agreement among states as to the nature of a political offence or the marks which differentiate it from other offences. Jurists have been unable to set forth any uniform doctrine; and when cases have come before courts of law, the judges have as a rule shirked the difficulty of a general definition and been content to determine whether or no the individual before them was a political offender. In some instances the motive has been deemed the all-important element; and if it was political it protected even the secret assassin from surrender. In others it has been declared that the connection of the act with a political movement of which it formed a part gave it a political character. Thus in 1890 the British Court of Queen's Bench refused the extradition of a Swiss, named Castioni, who had been concerned in an insurrection against the authorities of the Canton of Ticino, in the course of which he had shot a fellow-citizen during an

<sup>1</sup> *Treaties of the United States*, note on Extradition, p. 1293; Wharton, *International Law of the United States*, § 270.

attack upon the municipal palace at Bellinzona.<sup>1</sup> It is impossible to accept either view as quite satisfactory. One fails to see why rulers, whether republican or monarchical, should be preserved like game for the battues of excited enthusiasts, even though the motives of those who attack them are public and political, and not personal and self-regarding. Nor is it evident that every act of violence done in connection with a political movement, or even in furtherance of it, must therefore be taken out of the category of ordinary crime. Personal grudges and political hatreds often go hand in hand. Motives are difficult things to fathom at the best of times, and in the heat and turmoil of a revolution the evidence necessary to establish their character may never be forthcoming. What is wanted is some test applicable to the acts themselves, and capable of distinguishing vulgar and detestable crimes, even when done against political personages and for political objects, from the honorable efforts of noble and self-sacrificing men to free their country from what they honestly, though perhaps mistakenly, regard as grievous misrule. May not a reference to the laws of war supply us with the test we need? As Sir J. E. Stephen points out, the legal quality of many and many an act differs according to the belligerent or non-belligerent condition of the doer.<sup>2</sup> What is levying a requisition in one case is committing a robbery in the other. Shooting a man in action during war would be murdering him were there no war. But all things are not lawful in war. Secret assassination is forbidden, as also are poisoning, the ill-treatment of harmless non-combatants, plunder and indiscriminate destruction. If political offences were defined as *Acts done for political objects, which would be allowed by the laws of war were the relation of belligerency established between the doers of them and the state against which they are done*, we should be able to distinguish between

<sup>1</sup> Law Reports, *Queen's Bench Division*, 1891, pp. 149-168.

<sup>2</sup> *History of the Criminal Law*, II., 70, 71.

those crimes which shock the conscience of humanity, though the perpetrators of them are actuated by political motives, and acts which bring down upon the doers no strong moral condemnation, though we may think them violent and foolish. Under the suggested definition the shooting of a sovereign at a barricade in the course of an armed insurrection would be a political offence, because the laws of war make no distinction between sovereigns and other combatants; but the destruction of a sovereign, as Alexander II. of Russia was destroyed, by bombs suddenly thrown from what seemed a peaceful crowd, would be ordinary murder, because the laws of war do not allow assassination of the enemy's rulers. And further, dynamitards, pétroleurs, bomb-throwers, and the whole tribe of secret destroyers, would not be able to obtain safe asylum in foreign lands, for their methods are not those of lawful warfare; while at the same time those who incited to open rebellion, or took part in any revolutionary movement which used the ordinary methods of combat, would not render themselves liable to be surrendered as criminals. Whatever may be the merits or demerits of the test we have proposed, it is highly desirable that a test of some sort should be generally adopted. As matters stand a nation does not know what it assents to when it admits the political offender clause into its Extradition Treaties. States naturally and properly endeavor to guard against being made the agents of the political purposes of neighbors with whose modes of government they may have no sympathy. But in the attempt to do so they must be careful not to protect the enemies of civilization itself.

Great Britain and America will surrender their own subjects who, having committed offences abroad, succeed in reaching their native land before they are arrested. But many countries decline to carry the principle of the territoriality of crime to this extent, and either try the offenders themselves if the offence is justiciable under their law, or

allow them to escape unpunished. There seems little reason for a course of action dictated either by an exaggerated notion of a citizen's privileges or by a profound distrust of the administration of justice in foreign lands. A case can always be watched, and, in the unlikely event of its being conducted with manifest unfairness, remonstrances can be made. If civilized states have sufficient confidence in one another to enter into Extradition Treaties at all, they ought to be willing to surrender their own subjects when occasions arise.

## CHAPTER IV.

### RIGHTS AND OBLIGATIONS CONNECTED WITH EQUALITY.

#### § 134.

FROM the time of Grotius to the present day publicists have declared that all independent states are equal in the eye of International Law. The equality they speak of is not an equality of power and influence, but of legal rights. They hold that the smallest and weakest of independent political communities has exactly the same position before the law of nations as the strongest and most extensive empire. Doubtless this theory was for a long time productive of great good. It gave weak states an admitted principle to appeal to in the case of aggression from stronger neighbors; and though it did not often prevent high-handed wrong, it placed the brand of illegality upon transactions of the order familiar to readers of the fable of the wolf and the lamb. And the result was that when helpless states were wantonly attacked, the aggressor invented some plausible excuse. Either the weaklings had been themselves guilty of a wrong which must be punished, or the Balance of Power was seriously disturbed on account of their nefarious conduct, or they were meditating outrages upon neighbors who were therefore reluctantly compelled to attack them in self-defence. Thus a certain amount of lip-service was done to the principles of morality; and respect for International Law was kept up in the midst of transactions which were in reality lawless.

Meaning and utility of the principle of Equality. Modifications now necessary in the statement of it.

But a careful examination of recent international history seems to reveal a series of important facts, which can have no other meaning than that the doctrine of Equality is becoming obsolete and must be superseded by the doctrine that a Primacy with regard to some important matters is vested in the foremost powers of the civilized world. Europe is working round again to the old notion of a common superior, not indeed a Pope or an Emperor, but a Committee, a body of representatives of her leading states. During the greater part of the present century Great Britain, France, Austria, Prussia and Russia have exercised by concerted action a kind of superintendence over some departments of European affairs, and in 1867 Italy was invited to join them. These six states are called the Great Powers, and the agreement of the Great Powers is called the Concert of Europe, a phrase which seems to indicate that what is done by their concerted action is done on behalf of the whole of Europe and is binding upon other states, even though they have not been formally consulted with regard to it. On the American continent a similar primacy, though hardly of so pronounced a character, seems to be vested in the United States. We do not assert that the hegemony of the Great Powers in the Old World and the United States in the New is an undoubted principle of public law. All we contend for is that events are tending in that direction and, unless the tendency is speedily reversed, the Grotian doctrine of Equality will soon be a thing of the past. A brief historical review will be sufficient to indicate the grounds on which this proposition is based.

### § 135.

The establishment of the Kingdom of Greece in 1832 was preceded by long and intricate negotiations between the Great Powers. The armed intervention which forced Turkey to give up the territory of the new Kingdom was the work of England, France

The Primacy of  
the Great Powers  
in Europe.



and Russia, who guaranteed the integrity of the Greek state; but Austria and Prussia were kept informed of all that was done, and, when in 1863 fresh arrangements became necessary owing to the deposition of King Otho, the three guaranteeing states obtained in a more definite manner the co-operation of the other two. The annexation of the Ionian Islands to Greece was agreed upon by all the Great Powers; and at the time of the cession, the neutralization of Corfu and Paxo was declared by the Courts of Great Britain, France and Russia "with the assent of the Courts of Austria and Prussia."<sup>1</sup> In any emergencies which have since arisen all the Great Powers have been consulted as a matter of course, and the Concert of Europe has undertaken the settlement of difficulties. From 1876 to 1881 the Greek claims for an increase of territory were placed before various Conferences and Congresses; and Turkey was at last induced by the pressure of the Powers to cede a portion of what had been demanded. And when in 1886 Greece showed a disposition to attack the Ottoman Empire in order to obtain the remainder, the Great Powers again interfered, and after some negotiation all of them, with the exception of France, joined in establishing a Pacific Blockade<sup>2</sup> of the Greek coast, till the little Kingdom yielded and disbanded its forces.<sup>3</sup>

The Kingdom of Belgium also owes its origin to the Great Powers, who were all formally concerned in the question from the first. They were called in originally by the King of Holland to mediate between him and his Belgian subjects, who had revolted in 1830. But they soon let it be understood that they intended to deal with the matter as seemed best to them, and in spite of his remonstrances and armed opposition they erected Belgium into a separate Kingdom and guaranteed the perpetual neutrality of its territory. In the course of the negotiations serious disagreements arose among

<sup>1</sup> Holland, *The European Concert in the Eastern Question*, p. 51.

<sup>2</sup> See § 159. <sup>3</sup> In 1897 the Great Powers again intervened to prevent the annexation of Crete to Greece, and to dictate the terms of peace between Greece and Turkey.

the powers, and it was not till 1839 that the question was settled. While it lasted an English fleet blockaded the Dutch ports and a French army besieged and took Antwerp.<sup>1</sup> When the Concert of Europe was established it was by no means disposed to allow its decrees to be set at naught.

The erection of Egypt into a semi-sovereign state under the suzerainty of the Porte was, as we have seen,<sup>2</sup> the work of the Great Powers. France was unable to concur in the arrangements embodied in the Quadruple Treaty of 1840; but her voice has been none the less potent on that account in subsequent negotiations. She has played a leading part in the regulation of Egyptian affairs and is most anxious to terminate the present British occupation of the country. It is quite certain that this is but a temporary feature, though its duration is exceedingly uncertain. When it comes to an end, the arrangements which are to succeed it will be submitted to the European Concert. The final settlement must, in the words of Mr. Gladstone, "be arrived at with the intervention and under the authority of Europe, and never could be adequately founded upon the simple conclusion of any single power of Europe."<sup>3</sup>

One of the main objects of the Crimean War, and the only one which has been permanently attained, was to take the power of settling the destinies of the subject Christian populations of Turkey out of the hands of Russia alone, and vest it in the Concert of Europe. Though Austria and Prussia had not been belligerents they were admitted to the Conferences which drew up the Treaty of Paris in 1856. This was done because they were Great Powers, and it was felt that no settlement of the Eastern Question could be satisfactory if they were excluded from it. Acting on the same principle Great Britain insisted that Russia should not

<sup>1</sup> Wheaton, *History of the Law of Nations*, p. 550.

<sup>2</sup> See §§ 49, 50.

<sup>3</sup> Speech in the House of Commons, Aug. 10, 1882; see *Hansard, 3d Series*, Vol. CCLXXIII., 1891.

be allowed to make a separate peace with Turkey in 1878, and after a sharp diplomatic struggle her view prevailed. The Treaty of San Stefano was submitted to a European Congress, in which England, France, Germany, Austria and Italy took part along with Russia and Turkey, the two principal belligerents. The Congress discussed exhaustively the questions raised by the war, and substituted the Treaty of Berlin for the Treaty of San Stefano, which was regarded as merely a preliminary document to be modified by general agreement.<sup>1</sup>

In addition to superintending and controlling the great territorial and political changes we have described, we find the Great Powers receiving Turkey into the family of nations and providing for the international works at the mouth of the Danube in 1856, conferring the rank of a Great Power on Italy in 1867, neutralizing Luxemburg in the same year, granting conditional Recognition of Independence to Montenegro, Roumania and Servia in 1878, and leading smaller maritime states in the negotiations which brought about the neutralization of the Suez Canal in 1888. These cases seem to show not merely a superiority in influence but a superiority before the law. The Great Powers make new arrangements, and other states accept them and act upon them for the future. Over the group of problems which we call by the generic name of the Eastern Question the authority of the Powers is absolute and complete. There is scarcely a detail which they do not settle by agreement among themselves. There are other questions, such as the security of the neutralized states of Europe, which they deem matters of common concern ; while over the great majority of subjects which may arise between nations they make no attempt to exercise control, but leave the parties to settle their disagreements among themselves and possibly to go to war over them. The authority of the European Concert is limited, its jurisdiction rudimentary, and its procedure indefinite

<sup>1</sup> Holland, *European Concert in the Eastern Question*, pp. 220-241.

and uncertain. But it exists and is one of the great features in the international politics of the civilized world. Sometimes it enforces its authority by war or the threat of war; sometimes one or two of its members take upon themselves to compel submission to its dictates; sometimes it merely gives advice. It is not contended that the Primacy of the Great Powers confers on them in their individual capacity any greater rights than those possessed by other members of the family of nations. In matters connected with property, jurisdiction and diplomacy, they are on the same footing as their smaller neighbors, nor do they claim as belligerents or neutrals privileges which would not be accorded to the weakest of independent states. It is only when they act collectively that they possess a superintending authority not granted to any temporary alliance. Europe allows them in some matters to speak on its behalf. The arrangements they make are accepted and acted upon by other states, not only when they refer to the redistribution of territory, which might be regarded as an accomplished fact to be taken note of whether effected by fair means or foul, but also when they remodel political arrangements in such a way as to impose continuous obligations upon other powers who were not admitted to their councils. The neutralization of Belgium, for instance, is regarded as being under the protection of the public law of Europe, and every European state is held bound not to attack her as long as she fulfils the fundamental conditions of her existence. But the Belgian Kingdom was erected and neutralized by the action of the Great Powers, who gave it the peculiar *status* which it possesses. They, therefore, imposed upon the rest of Europe fresh obligations; and the fact that they were allowed to do so, not only in this case but in many others, shows that their position of Primacy is recognized by tacit consent. The future alone can decide whether their present limited and ill-defined authority will become formal and general. Much will depend upon the way in which it is exercised. The Concert

of Europe may develop into a great International Court of Appeal, or it may go the way of the numerous leagues and alliances which from time to time exercised a brief control and then dissolved to be replaced by new combinations.<sup>1</sup>

### § 136.

The position of the United States on the American continent is in some respects like and in others exceedingly unlike that which is accorded in Europe to the six Great Powers. The great Republic of the New World stands out as a giant among pigmies. There is no other state in the same hemisphere which can be compared to her in strength and influence. If it be true that there is a Primacy in America comparable in any way with that which exists in Europe, it must be wielded by her and by her alone. There is no room for that machinery of Conferences, Congresses, and diplomatic communications which plays so large a part in the proceedings of the Great Powers. The supremacy of a Committee of States and the supremacy of a single state cannot be exercised in the same manner. What in Europe is done after long and tedious negotiations, and much discussion between representatives of no less than six countries, can be done in America by the decision of one Cabinet discussing in secret at Washington. But though the method of control must be different, the kind of control may be the same. We cannot assert that any President has gone to the length of assuming the powers exercised by the European Concert in dictating territorial arrangements or calling new states into being. An American Belgium does not exist; and no American Greece has received an increase of territory from some decaying neighbor on the demand of the United States. But though supremacy has never been exercised in this

The Primacy of  
the United States  
in America.

<sup>1</sup> Lawrence, *Essays on Some Disputed Questions in Modern International Law*, V.

extreme form, there can be no doubt that very large powers of supervision have been claimed for certain definite purposes which tend rather to increase in number than to decrease. The doctrine of Washington's Farewell Address, eloquently paraphrased by Jefferson in his Inaugural in the famous words, "peace, commerce, and honest friendship with all nations—entangling alliances with none," grew in the hands of President Monroe, and under the circumstances connected with the project of the Holy Alliance to restore the dominion of Spain over her revolted American colonies, into an assertion that the United States would consider any attempt on the part of European powers "to extend their system to any portion of this hemisphere as dangerous to our peace and safety." With this was joined in the same message a declaration that "the American continents by the free and independent condition which they have assumed and maintain, are henceforth not to be considered as subjects for future colonization by any European powers." These two principles taken together form the Monroe Doctrine, which has been repeated again and again in documents emanating from the executive department. It has been the subject of a vast amount of comment, and the glosses upon it sometimes go far beyond the original text. We will not attempt to collect, still less to reconcile, the various statements that have been put forth from time to time. What we have to do is to make clear the position which the United States does in fact occupy with regard to the other powers of the New World.

Soon after the assertion of the Monroe Doctrine in the Presidential Message of Dec. 2, 1823, the revolted colonies of Spain, then newly recognized as independent states, took the ground that the utterances of President Monroe constituted a pledge of support from the United States to the other American Republics in excluding European interference from the political complications of the American continent and preventing any European state from

acquiring by colonization further dominion in the New World. They therefore proposed a Congress at Panama with a view to the formation of an alliance for mutual support. The scheme, however, ended in nothing, owing to the opposition of the Congress and people of the United States to any agreement which would limit their freedom of action on each case as it arose. In April, 1826, the House of Representatives resolved "that the Government of the United States ought not to be represented at the Congress of Panama, except in a diplomatic character, nor ought they to form any alliance, offensive or defensive, or negotiate respecting such an alliance with all or any of the Spanish American Republics ; nor ought they to become parties with them, or either of them, to any joint declaration for the purpose of preventing the interference of any of the European powers with their independence or form of government, or to any compact for the purpose of preventing colonization upon the continent of America ; but that the people of the United States should be left free to act, in any crisis, in such a manner as their feelings of friendship towards these republics and as their own honor and policy may at the time dictate." This attitude of non-committal has been maintained ever since. The United States is bound by no pledge to any other American state to assist it by force of arms in resisting European intervention. But at the same time it has acted again and again upon the principles laid down by Jefferson when he was consulted by President Monroe in the autumn of 1823. He then wrote, "Our first maxim should be, never to entangle ourselves in the broils of Europe ; our second, never to suffer Europe to intermeddle with Cisatlantic affairs." More than once Great Britain and France have been informed that the United States would not see with indifference the transfer of Cuba from Spain to any other European power. The Clayton-Bulwer Treaty of 1850 bound England not to exercise dominion over "any part of Central America," and,

in the course of the long discussions which followed as to the exact meaning and extent of the obligation thereby imposed, persistent diplomatic pressure at last prevailed upon the British Government to give up the Protectorate it had acquired long before the treaty was signed over the Indians of the Mosquito Coast. The French intervention in Mexico coincided in point of time with the great American Civil War; but the Federal Government, preoccupied as it was, did not neglect to protest whenever opportunity offered, not indeed against the attack on Mexico by France, but against the attempt on the part of the French army of occupation to destroy the Republican institutions of the country and set up an Emperor, contrary, it was maintained, to the wishes of the great majority of the Mexican people. The downfall of the Confederacy enabled the administration at Washington to act with greater vigor than before; and its energetic remonstrances, coupled with the knowledge that if they were disregarded force would in all probability be used, caused France to withdraw her troops and led to the speedy downfall of the unfortunate Emperor Maximilian.

In so far as the shutting out of the European state-system from American soil is concerned, we may assert that the United States acts, and will continue to act, as warder of the continent. Whether it will endeavor to exercise any superintendence over international affairs of a purely American character is perhaps a little more doubtful. Of recent years there has been a tendency in that direction; but it has been met by another tendency, perhaps equally strong, not to sanction a policy which would entangle the country in complications outside its own territory. Thus the threat of 1881 to restrain Chili in her dealings with conquered Peru was toned down in 1882 to a proffer of kindly offices in reconciling the two Republics; and the President withdrew from the Senate the Treaty of 1884, by which the United States agreed to find the capital for the construction of an



oceanic canal from the Atlantic to the Pacific through the territory of Nicaragua, and covenanted to receive in return two-thirds of the revenue arising from the traffic and to hold in joint sovereignty with Nicaragua the strip of land through which the canal was to pass. It is necessary to speak with caution in describing the present position of the United States with respect to the other powers of the American continent; but the facts seem hardly consistent with the old doctrine of the absolute Equality of Independent States. The words of Mr. Fish in his Report of July, 1870, to President Grant more accurately define it. The Secretary of State says, "The United States, by the priority of their independence, by the stability of their institutions, by the regard of their people for the forms of law, by their resources as a government, by their naval power, by their commercial enterprise, by the attractions which they offer to European immigration, by the prodigious internal development of their resources and wealth, and by the intellectual life of their population, occupy of necessity a prominent position on this continent which they neither can nor should abdicate, which entitles them to a leading voice, and which imposes on them duties of right and of honor regarding American questions, whether those questions affect emancipated colonies, or colonies still subject to European dominion." This statement is correct both in fact and in theory, if we except from the last clause of it the internal affairs of the few remaining European colonies in the New World. It will hardly be contended that the Government of Washington has any right, moral or legal, to qualify the independence of the countries to which they belong by meddling with their domestic affairs.<sup>1</sup>

<sup>1</sup> For the Monroe Doctrine and its various phases see Wharton, *Digest of the International Law of the United States*, §§ 57 et seq.; Wheaton, *International Law* (Dana's ed.), note 36; and *American History Leaflets*, No. 4. The intervention of President Cleveland in 1895 and 1896 in the dispute between Great Britain and Venezuela as to the boundary between the territory of the latter and British Guiana, has given to the Monroe Doctrine a widely extended significance.

## § 137.

The principle of Equality, with the limitation suggested in the previous sections, pervades and influences the whole of International Law. But the definite rules that can be traced to it are few in number and not of first-rate importance. They relate to matters of ceremony and etiquette, which are the outward signs of equality or the reverse. The principle appears to demand that all independent states should be treated alike; but though this is possible in some matters, such as firing salutes or supplying guards of honor, it is impossible in others, such as the order of sitting at a state ceremonial or the order of signing an international document. To meet the difficulties occasioned by these instances and others of a similar kind, rules have been devised which reconcile the theoretical equality of states with the precedence which it is necessary should exist among sovereigns and their representatives. In the seventeenth and eighteenth centuries an exaggerated importance was attached to questions of etiquette. Readers of Macaulay's *History* will remember the graphic description given in Chapter XXII. of the squabbles of the Plenipotentiaries assembled at the Conference of Ryswick; and those who are desirous of acquiring further information on the subject will find what they want in Bernard's *Lectures on Diplomacy*. An amusing instance of the trivialities out of which disputes could grow is afforded by Sir John Finett's account of the marriage festivities of the Princess Elizabeth, daughter of James I. of England, and Frederick, the Elector Palatine. The worthy knight was Master of the Ceremonies at the English Court, and evidently took himself and his official duties very seriously. We subjoin a short quotation from his *Observations touching Forren Ambassadors*, preserving the original spelling. He writes, "At this time the French and Venetian Ambassadors invited to the marriage were not free from Punctillios. That made

Matters of ceremony and etiquette connected with the doctrine of Equality.

an effort to precede the Prince. This stood upon it that they were not to sit at the table without Chaires (though the Prince . . . had but a stoole, the Count Palatine and the Princess, onely for the honour of the day having Chayres) and insisting upon a formality that the Carver was not to stand above him; but neither of them prevailed in their reasonlesse pretences." All ceremonial disputes, however, were not so fantastic or so easily settled as this one. Occasionally they led to bloodshed, and were the pretexts if not the actual causes of war, as when in 1672 Charles II. of England commenced hostilities against the United Provinces, ostensibly because one of his royal yachts had not been properly saluted when passing through the Dutch fleet near the coast of Zealand.

### § 138.

But it must not be supposed that etiquette is altogether unimportant, or that states in modern times have ceased to care for it, because they no longer go to war about such matters as titles and salutes. It is necessary for the dignified and orderly conduct of international affairs that ceremonies should exist and that rules of precedence should be laid down and accepted. Courtesy demands that states should abide by these rules in their mutual intercourse. The power which neglects them degrades itself in the Society of Nations to the level of a rude boor in the Society of Individuals. Moreover some of them are symbolic. The honor paid to the flag, for instance, when it is saluted by a foreign man-of-war entering a friendly port is something more than a piece of etiquette. To omit the salute would imply that the state visited was inferior to other states which still received the customary honor; and therefore failure to fire the usual number of guns would be justly resented. But it is hardly likely that such a case will arise in future, and, if it does, we may safely say that the peace of nations will not be disturbed by it.

Rules of precedence of states and their representatives.

Many of the old difficulties have been settled by express or tacit agreement, others have disappeared with lapse of time and change of circumstances, and with regard to those which still remain a disposition to compromise and to avoid elevating trifles into matters of supreme importance happily prevails. We will give a brief sketch of existing arrangements, dealing first with

*Rules of precedence for states and their representatives.*

The relative rank of states and sovereigns has never been determined by general agreement. A fixed order of precedence is quite compatible with equality before the law; but, inasmuch as the pride of rulers is involved in questions concerning it, no such order has ever been accepted. The attempt which was made at the Congress of Vienna of 1815 to classify the states of Europe for ceremonial purposes failed entirely. Custom has, however, given birth to a few rules. It used to be held that states which enjoyed royal honors took precedence of states which did not. But as the enjoyment of royal honors means little more than the right of sending diplomatic ministers of the first class, and that right is now accorded to all independent states, the distinction based upon it has become obsolete and unmeaning. The rules in existence now are as follows: (a) Fully sovereign states take precedence of states under the power of a Suzerain. (b) Precedence is accorded to the Pope by Roman Catholic states, but not by Protestant states or by states which hold the faith of the Greek Church. (c) Sovereigns who are crowned heads take precedence of those who are not, such as Grand Dukes or Electors; but powerful Republics, such as the United States and France, rank along with the great monarchical states. The old view that a Republic was inferior to an Empire or a Kingdom has now but little influence; but two centuries ago it was enormously strong. The Dutch had great difficulty in making good their position at the Congress of Münster and on other occasions; and

it required all the firmness of Cromwell to secure for the Commonwealth the ceremonial rank accorded to the old English Monarchy.

When a great treaty or other international document has to be signed by several powers, various devices are resorted to for the purpose of preventing disputes as to precedence. The most famous of them is the *Alternat*, a usage whereby the signatures alternate in a regular order, or in one determined by lot, the name of the representative of each state standing first in the copy kept by that state. Another plan is to sign in the alphabetical order of the names of the powers in the French language.

The relative rank of the regular diplomatic agents of states is determined by fixed rules which have received general assent and are acted upon by all civilized nations. We will discuss them when we deal with Diplomacy and Negotiation.<sup>1</sup>

### § 139.

We will now proceed to deal with

#### *Titles and their recognition by other states.*

Every sovereign may take whatever title is conferred upon him by the law of his own country; and his subjects are, of course, bound to use it in all official documents. But other states are under no international obligation to use a new title taken by the head of one of their number. They may decline to do so, and continue in their official intercourse the use of the old title, or they may use the new one only on conditions. The latter course is sometimes adopted if the new title is accounted higher than the old. It is then often stipulated that the use of it should not be held to confer a higher degree of rank and precedence upon the sovereign who has assumed it. These arrangements are well illustrated by the

Titles and their  
recognition by  
other states.

<sup>1</sup> See § 143.

history of the reception and acknowledgment abroad of the imperial title of the Czar of Russia. Peter the Great proclaimed himself Emperor of all the Russias in 1701. England was the only power which recognized the new title at once. Prussia did not acknowledge it till 1723, the German Empire till 1746, Spain till 1759, and Poland till 1764.<sup>1</sup> When France recognized it in 1745 she stipulated that it should make no change in the ceremonies formerly observed between the two courts.

### § 140.

The last matters we have to consider in connection with Equality and its outward signs are

#### *Maritime ceremonials.*

These are salutes between ships or between ships and forts. They are carried on by firing artillery or striking sails.

*Maritime ceremonials.*

The law of each state prescribes their details as between its own vessels. As between vessels of different states, or between vessels of one state and forts and land batteries of another, matters are regulated by express stipulations or by international custom. In the days when states claimed dominion over portions of the high seas and saluting first was looked upon as an acknowledgment of superiority, great disputes arose about salutes. British cruisers were instructed to capture vessels which refused to give proper honor to their flag in the seas claimed as part of the territorial possessions of the Crown.<sup>2</sup> Philip II. of Spain forbade his vessels to salute first when they passed the cities and forts of other sovereigns. France and Russia, hopeless of overcoming difficulties, agreed by treaty in 1787 that in future there should be no salutes between their vessels either in port or on the high seas, and a similar convention was negotiated in 1829 between Russia and Den-

<sup>1</sup> Halleck, *International Law* (Baker's ed.), I., 100.

<sup>2</sup> Walker, *Science of International Law*, pp. 167-171.

mark.<sup>1</sup> In modern times saluting is regarded merely as an act of courtesy; and treaties and custom have given birth to a number of rules which meet with general acceptance. The chief of them are as follows: (a) A ship of war entering a foreign port or passing a fort salutes first, unless the sovereign or his ambassador is on board, in which case the port or fort salutes first. In any case the salute, which is held to be an honor paid to the national flag, is returned gun for gun, by a fort if there is one in the place, if not by a ship of war. (b) When public vessels of different nationalities meet, the ship or squadron commanded by the officer inferior in rank salutes first, and the salute is returned gun for gun. (c) No international salutes are to exceed twenty-one guns. (d) Merchant vessels salute ships of war by lowering the topsails, if they have no guns on board. Sometimes the flag is lowered, but this is regarded by most states as derogatory to their dignity.

<sup>1</sup> D' Hauterive and De Cussy, *Recueil des Traites*, Pt. I., Vol. III., p. 252, and Pt. II., Vol. II., p. 70.

## CHAPTER V.

### RIGHTS AND OBLIGATIONS CONNECTED WITH DIPLOMACY.

#### § 141.

THE affairs of nations could not be conducted without mutual intercourse. Every state, however barbarous, recognizes this, and even savage tribes respect the persons of heralds and envoys. But among the family of civilized nations who are subjects of International Law intercourse is carried on to a great and steadily increasing extent; and with its growth has grown a system of regulating it by special formalities, employing special agents to carry it on and granting them special immunities.

Diplomatic intercourse necessary.  
Growth of resident embassies.

In the Middle Ages when the intercourse between peoples was comparatively meagre, negotiations were only occasional incidents in the life of a state. They were carried on by envoys, sent abroad to do the special business on hand and expected to return as soon as it was finished. The service was often one of difficulty and danger, for though the persons of ambassadors were held sacred in the country to which they were sent, they received little protection in the states they passed through on the way. There were plenty of robber bands for them to guard against and plenty of physical obstacles for them to overcome.<sup>1</sup> The revival of commerce and letters at the time of the Renaissance, and the immense impetus given to human activity by the discovery

<sup>1</sup> Bernard, *Lectures on Diplomacy*, pp. 121, 122.



of the New World, made intercourse between states more common and more necessary than before. But the introduction of the practice of sending permanent ambassadors to reside at foreign courts is due more to statecraft than to utility. Louis XI. of France, who reigned from 1461 to 1483, is said to have been the first sovereign to adopt it, his design being to have a sort of chartered spy at the Court of each of his powerful neighbors. After a time the convenience of the practice secured its general adoption, and by the middle of the seventeenth century it had become recognized as the regular method of carrying on diplomatic intercourse. But it had to win its way against a mass of jealousy and suspicion, largely caused by the unscrupulous character of the early diplomatists. "If they lie to you, lie still more to them," said Louis XI. to his ambassadors.<sup>1</sup> "An ambassador," said Wotton in a punning epigram, "is a person who is sent to lie abroad for the benefit of his country." Henry VII. of England is praised by Coke as "a wise and politique King" because he would not suffer ambassadors from other states to remain at his Court after their immediate business was finished;<sup>2</sup> and as late as 1660 threats were uttered in the Polish Diet that the French Ambassadors should be treated as spies if they would not return home.<sup>3</sup> But the new system became a necessity as the complexity of international affairs increased in the seventeenth century; and in spite of the unfavorable opinion of Grotius,<sup>4</sup> who says that resident embassies may be excluded by states and speaks of them as "now common but not necessary," it grew and prospered, and a great variety of observances grew up with it and were gradually embodied in International Law.

<sup>1</sup> Flasseau, *Diplomatie Française*, I., 247.

<sup>2</sup> *Fourth Institute*, Ch. XXVI.

<sup>3</sup> Ward, *History of the Law of Nations*, II., 484.

<sup>4</sup> *De Juri Belli ac Pacis*, II., XVIII., iii.

## § 142.

At first diplomatic ministers were of one kind, who were usually called *Ambassadors* and were supposed to represent the person as well as the affairs of their sovereign. Louis XI. of France introduced the custom of sending persons of an inferior sort, termed *Agents*, to transact his affairs without representing his person. His diplomacy frequently worked in secret. He sometimes sent his barber on an occult mission, and it is obvious that his purpose would have been defeated by an exhibition of state ceremonial.

Development of  
different kinds of  
diplomatic min-  
isters.

Thus matters stood at the beginning of the seventeenth century, when permanent legations became common. Soon after we find the Agent disappearing from the ranks of diplomatic ministers, and becoming merely a person appointed by a Prince to manage his private business at a foreign court. But the distinction between the representative of his sovereign's person and the representative of his sovereign's affairs continued to be made. The first was called an Ambassador, the second an *Envoy* or an *Envoy Extraordinary*. Below the Envoy in rank came at the beginning of the eighteenth century a third class called *Residents*. Vattel says of them that their "representation is in reality of the same nature as that of the Envoy,"<sup>1</sup> but custom undoubtedly ranked them below the second order of diplomatic ministers. Sometimes they had no Letters of Credence, and in that case their mission must have been of a semi-private character. To these three orders of diplomatic agents was added in the eighteenth century a fourth, that of *Ministers*. According to Vattel this was done to avoid the constant disputes about precedence which, judging from their number and bitterness, must have taken up no small portion of the time and energy of the diplomatists of the last two centuries. He says "The Minister represents his master in a vague and

<sup>1</sup> *Droit des Gens*, IV., § 73.

indeterminate manner, which cannot be equal to the first degree, and consequently makes no difficulty in yielding to an Ambassador. He is entitled to all the regard due to a person of confidence to whom the sovereign commits the care of his affairs, and he has all the rights essential to the character of a public minister."<sup>1</sup> The very essence, then, of a Minister was the indeterminate character of his position. He was "not subjected to any settled ceremony," and we cannot therefore rank him with the other kinds of diplomatic agents. The only thing absolutely fixed about him was that he came below an Ambassador in order of precedence. Sometimes he was called *Minister Plenipotentiary*, a title which seems to have implied higher rank than simple Minister.<sup>2</sup>

### § 143.

The foregoing remarks point to the confusion which existed a hundred years ago as to the relative rank of diplomatic agents, and demonstrate clearly the need of some authoritative classification. At the Congress of Vienna in 1815 an attempt was made to establish by general consent a regular order of rank and precedence. The result was the establishment of the three following classes: —

*Classification  
of diplomatic  
ministers.*

- (a) Ambassadors and Papal Legates or Nuncios. These represented the person and dignity of their sovereign as well as his affairs.
- (b) Envoys, Ministers Plenipotentiary, and others accredited to sovereigns.
- (c) *Chargés d'Affaires*, accredited not to sovereigns, but to Ministers of Foreign Affairs.<sup>3</sup>

This order, however, failed to reconcile every difference. It had been agreed that, while all the diplomatic agents belong-

<sup>1</sup> *Droit des Gens*, IV., § 74.    <sup>2</sup> C. de Martens, *Guide Diplomatique*, § 11.

<sup>3</sup> Hertzslet, *Map of Europe by Treaty*, I., 62, 63.

ing to a class should rank before any of the class below it, within a class precedence should be determined according to the length of the stay of each individual diplomatist at the Court to which he was accredited. But in practice it was found that the Great Powers were unwilling to allow the Envoys and Ministers of minor states to take precedence of their representatives of the second class. Accordingly the Congress of Aix-la-Chapelle of 1818 created a class of *Ministers Resident accredited to Sovereigns*, which it interpolated between the second and third of the classes agreed upon at Vienna.<sup>1</sup> The minor states could thus have Ministers, and yet avoid making a claim for them to precedence over the Ministers of the Great Powers. This device seems to have been successful. The order and rank of diplomatic agents is now settled by a general agreement to recognize the four classes above described, and to regulate precedence in each class by length of residence. Each state sends what kind of representative it pleases, the only restriction being the now obsolete one that none but states enjoying Royal Honors can send Ambassadors. States agree as to the rank of their respective agents at each other's courts, and send to every neighbor a representative of the same class as the representative they receive from it. Thus when in 1893 the United States resolved for the first time in their history to employ diplomatic agents of the first class, they accredited Ambassadors to Great Britain, France, and a few other great powers who were willing to raise their Ministers at Washington to ambassadorial rank.

Ambassadors used to have a right to a Solemn Entry into the capital of the state to which they were sent. This took place at the beginning of their mission, and was made an occasion of great display. The Ambassadors of other states joined in the procession and sometimes quarrelled for precedence. For instance, in 1661 an armed conflict took place on Tower Hill, London, between the retinues of the French

<sup>1</sup> Hertslet, *Map of Europe by Treaty*, I., 575.

and Spanish Ambassadors, on account of the attempt of each to follow next to the King in the procession formed for the Solemn Entry of the representative of Sweden. In the course of the struggle a Spaniard ham-stringed the horses of the French Ambassador's coach, and thus enabled the Spanish coach to take the coveted place; but reparation was afterwards obtained by Louis XIV., who threatened war should it be refused.<sup>1</sup> The discontinuance of the practice of Solemn Entry renders such scenes impossible now. Ambassadors, as representing the person and dignity of their sovereign, are held to possess a right of having personal interviews, whenever they choose to demand them, with the sovereign of the state to which they are accredited. But modern practice grants such interviews on suitable occasions to all representatives of foreign powers, whatever may be their rank in the diplomatic hierarchy. Moreover the privilege can have no particular value, because the verbal statements of a monarch are not state acts. Formal and binding international negotiations can be conducted only through the Minister of Foreign Affairs.

#### § 144.

Every independent member of the family of nations possesses to the full the right of sending diplomatic ministers to other states; but it belongs to part-sovereign communities only in a limited form, the exact restrictions upon the diplomatic activity of each being determined by the instrument which defines its international position. Egypt, for instance, under the Sultan's Firmans of 1866 and 1867 may negotiate commercial and postal conventions with foreign powers, provided they do not contain political arrangements; and to this condition the Firman of 1879 added the further obligation of communicating them to the Porte before they are published.<sup>2</sup> In the case of the looser sort of

Sovereign states possess the right of legation fully; part-sovereign states possess it to a limited extent.

<sup>1</sup> Ward, *History of the Law of Nations*, II., 458-462.

<sup>2</sup> Holland, *European Concert in the Eastern Question*, pp. 116-128.

Confederations the treaty-making and negotiating power of the states which comprise them is limited by the Federal Pact. Thus each member of the German Confederation which existed from 1815 to 1866 was bound not to do anything in its alliances with foreign powers against the security of the Confederation or any member of it, and when war was declared by the Confederation no member of it could negotiate separately with the enemy.<sup>1</sup> Permanently neutralized states can make no diplomatic agreements which may lead them into hostilities for any other purpose than the defence of their own frontiers. Belgium, for instance, though she took part in the Conference of London of 1867, which decreed and guaranteed the neutralization of Luxemburg, did not sign the Treaty of Guarantee because it bound the signatory powers to defend the Duchy from wanton attack.

### § 145.

It can hardly be said that states are under an obligation to send and receive diplomatic agents, but, as without them official international intercourse would be impossible, any state which declined to make use of them would *ipso facto* put itself out of the family of nations and beyond the pale of International Law. No civilized state is likely to wish to do this ; and therefore we may assume with confidence that all such states will exercise their Right of Legation. But a state may for grave cause temporarily break off diplomatic intercourse with another state. Such an act is, however, a marked affront, and is therefore the sign of a rupture which only just falls short of war, and indeed may lead to it. For example, in January, 1793, Great Britain broke off diplomatic intercourse with France owing to the execution of Louis XVI. on the 21st of that month, and ordered Chauvelin, the French Ambassador, to leave the country. A few days

The rupture of diplomatic relations is a serious step, which generally ends in war.

<sup>1</sup> Wheaton, *International Law*, § 47.

later, on February the 8th, France commenced war. When states have previously determined upon war, the withdrawal of the diplomatic representatives on both sides is an invariable preliminary or concomitant of the first acts of hostility. But unless such a resolve has been taken, it is possible that the displeasure shown by the cessation of diplomatic intercourse may pass over without a rupture of peaceful relations. This occurred in connection with the case of Sir Henry Bulwer, the British Ambassador at Madrid in 1848. He was ordered by the Spanish Government to leave the country on the ground that he had been concerned in aiding rebellion. Diplomatic intercourse between Great Britain and Spain was in consequence broken off for two years, at the end of which time it was resumed, no hostilities having taken place in the meantime.<sup>1</sup> It is obvious, however, that this mode of showing displeasure is not suited to disagreements between two states of the first rank ; for the amount of business requiring the attention of their representatives at the seat of each other's government is too great, and its nature too important, for it to be allowed to accumulate or remain undone with impunity.

### § 146.

Though the suspension of all intercourse is a sign of rupture, yet a state may without offence refuse to receive a particular individual as diplomatic representative from one of its neighbors, if it has good reasons for objecting to him. The fact that he is personally obnoxious to the sovereign of the country to which it is proposed to send him is accepted as sufficient ground for a refusal. Thus France declined to receive the Duke of Buckingham as Ambassador Extraordinary from Charles I. of England, because on a previous visit to the French Court he had posed as an ardent

But a state may without offence refuse on good grounds to receive a particular individual, or ask for his recall.

<sup>1</sup> Wheaton, *International Law* (Boyd's ed.), § 225 d.

lover of the Queen.<sup>1</sup> But should the objection raised be trivial, the government which proposed to send the representative is not bound to acquiesce in his rejection. A case of this kind occurred in 1885 when Austria declined to receive Mr. Keiley as Minister of the United States on the ground that his wife was a Jewess and that he was married to her by civil contract only. President Cleveland declined to cancel his appointment, and on his resignation made no new nomination, but entrusted the interests of America at Vienna to the Secretary of Legation acting as *Chargé d'Affaires ad interim*.<sup>2</sup>

Another reason for rejecting a diplomatic representative is public and pronounced hostility on his part to the people or institutions of the country to which he is accredited. The same Mr. Keiley who was refused on such inadequate grounds by the Government of Austria-Hungary had previously been refused for much better reasons by the Italian Kingdom. He had, according to Hall,<sup>3</sup> "openly inveighed against the destruction of the temporal power of the Pope"; and as its overthrow was effected by the arms of Italy, and in consequence relations of pronounced bitterness existed between the Papacy and the Italian Government, it was hardly to be supposed that his mission could be conducted in an acceptable manner. If a proposed representative is one of the subjects of the state to which he is sent, it may decline to receive him on the ground that the immunities of an ambassador are incompatible with the duties of a citizen. But, should he be received, full diplomatic privileges must be accorded to him. His country can refuse him, or accept him on conditions, if such conditions are agreed to by the power which sent him, but having once received him, it is not at liberty to exercise any authority over him on the

<sup>1</sup> Gardiner, *England under the Duke of Buckingham and Charles I.*, Vol. I., pp. 182, 183, 329.

<sup>2</sup> Wharton, *International Law of the United States*, § 83.

<sup>3</sup> *International Law*, p. 298, note.



ground that he is a subject and therefore amenable to its law. This point was raised in the case of Sir Halliday Macartney, a British subject who acted as Secretary to the Chinese Legation in London. An attempt was made in 1890 to compel him to pay local rates on the house which he occupied ; but it was decided that the claim could not be sustained, since he had been received without conditions in his diplomatic capacity and was therefore entitled to full diplomatic immunities.<sup>1</sup>

Just as a state may without offence decline to receive any particular person as the diplomatic representative of another state, if it has reasonable grounds for its refusal, so it may demand the recall of a resident Ambassador or other agent who has made himself obnoxious to the government of the country or the head of the state. Such a request is granted, if there is good reason for it, and if the Ambassador's country desires to remain on friendly terms with the country which demands his recall ; but the better opinion appears to be that it is under no obligation to recall merely because it is informed that the other government desires to be rid of the individual in question.<sup>2</sup> It has a right to ask for reasons and to judge of them ; and though, if it deems them inadequate, it cannot compel the authorities of the other state concerned to carry on diplomatic business with the agent whose conduct is impugned, it may decline to order him home, and may mark its sense of his dismissal by leaving the embassy for a time in charge of an inferior member of its diplomatic service. The early history of the United States affords an instance of the recall of a diplomatic minister on a demand caused by the most persistent and outrageous provocation. M. Genet, the Minister of the French Republic, openly violated the neutrality of the United States in the war between England and revolutionary France. He even attempted to set up French Prize Courts within Amer-

<sup>1</sup> The London *Times*, Feb. 25, 1890.

<sup>2</sup> *Message of President Harrison, Jan. 25, 1892.*

ican jurisdiction; and, instead of heeding the remonstrances addressed to him by the administration of Washington, endeavored to stir up popular feeling against the President and his Cabinet. At last a request was made for his recall; and the French Government not only acceded to it in 1794, but asked that he and his agents might be sent home under arrest, an extreme step which Washington very wisely declined to take.<sup>1</sup> In a much more recent case dismissal was added to the demand for recall. In the course of the Presidential campaign of 1888 Lord Sackville, the British Minister at Washington, received a communication purporting to come from a Mr. Murchison, a naturalized American citizen of British birth resident in California. The letter asked information from him as to the friendliness of the existing administration towards Great Britain, and intimated that the vote of the writer depended upon the reply, which should "be treated as entirely secret." Lord Sackville answered, in a communication marked "Private," that it was impossible to predict the course which Mr. Cleveland would take towards Great Britain if he were re-elected, but that in the writer's belief the party in power was desirous of maintaining friendly relations with the mother country. The letter of inquiry turned out to be a trick concocted for election purposes. It was published along with Lord Sackville's reply, and distributed broadcast as a campaign document by the party opposed to the Cleveland administration. In the midst of the excitement caused by it the British Minister granted an interview to a representative of a New York paper, in the course of which he is reported to have said, "Of course I understand that both the action of the Senate and the President's letter of retaliation were for political effect." Three days after he wrote to Mr. Bayard, then Secretary of State, to disclaim any intention of impugning the action of the executive. Under these circumstances his recall was demanded by telegraph on the 27th of Octo-

<sup>1</sup> Wharton, *International Law of the United States*, § 84.

ber. His Government felt unable to come to a decision till it had been placed in possession of the allegations against him and the evidence on which they were founded; but without further delay he was dismissed and his passport sent to him on the 30th of October. The British Minister acted with an absence of discretion remarkable in an experienced diplomatist. But he was deceived by a dishonorable artifice; and it ill became the country where the consideration due to a foreign representative had been so strangely neglected to hurry him out of its territory before his own Government had an opportunity of examining the evidence against him. Moreover, a new terror will be added to official life, if the case is to be taken as a precedent for surrounding private communications with the caution hitherto reserved for public statements.<sup>1</sup>

### § 147.

A number of formal observances have grown up with regard to the reception and departure of diplomatic ministers. They receive from their own Governments various documents, which confer on them their official character, and give them information as to the questions they are expected to deal with and the methods to be followed in negotiating upon them. First and most important among these documents is the *Letter of Credence*. It sets forth the name of the diplomatic agent and the general object of his mission, and requests that he may be received with favor and have full credit given to what he says on behalf of his country. It is generally addressed by the sovereign who sends to the sovereign who receives the minister; but in the case of a *Chargé d'Affaires* it is written by Foreign Minister to Foreign Minister; and when the head of a state is a temporary president or other elected officer, Letters of

Commencement and termination of diplomatic missions and the ceremonies connected therewith.

<sup>1</sup> British State Papers, *United States*. Nos. 3 and 4 (1888).

Credence are addressed not to him, but to the state of which he is for the time being the chief ruler. Power to act generally on behalf of his country is granted by the Letter of Credence a diplomatist takes with him to the Court where he is to reside. But agents charged with special business receive a document called their *Full Powers*, which is signed by the sovereign they represent and countersigned by his Minister for Foreign Affairs. The most common of these documents are the *General Full Powers*, which give authority to their possessor to negotiate with each and all the states represented at some Congress or Conference. They are generally delivered to the presiding plenipotentiary at the first sitting of the Conference, or exchanged and verified by the diplomatists present. A duly accredited diplomatic agent carries with him, in addition to his Letter of Credence or his Full Powers, a *Passport* which authorizes him to travel and describes his person and office. In time of peace it is a sufficient protection to him on his journey to the Court to which he is sent; but in time of war an ambassador sent to the enemy's Government requires a passport or safe conduct from it. No minister starts on his mission without his *Instructions*. These are directions given to a diplomatic agent for his guidance in the negotiations he is sent to conduct. They may be oral, but they are almost invariably written. He is not to communicate them to the Government to which he is accredited, or to his fellow Plenipotentiaries at a Conference, unless specially authorized to do so. If points arise on which he is without instructions, or on which he deems it expedient to deviate from his instructions, he must refer to his Government for directions. This is called accepting a proposal *ad referendum*; and it is frequently resorted to now that the telegraph and steam have made communication between a government and its agents at a distance rapid and easy.<sup>1</sup>

<sup>1</sup> Twiss, *Law of Nations*, §§ 212-214; C. de Martens, *Guide Diplomatique*, Ch. IV.

When a diplomatic minister reaches the capital of the country to which he is accredited, he notifies his arrival to the Minister for Foreign Affairs and demands an audience of the sovereign for the purpose of delivering his Letters of Credence. Ambassadors are entitled to a Public Audience, whereas ministers of the second and third classes have only a right to a Private Audience, and *Chargés d’Affaires* are obliged to be content with an audience of the Foreign Minister. The Public Audience is more ceremonious than the Private Audience, but at both the Letters of Credence are delivered to the sovereign, and formal speeches of good-will and welcome are made to one another by the two parties to the interview. When the diplomatic agent has gone through this ceremony all the rights and immunities of public ministers attach to him and continue till the end of his mission. Previously they are his rather by courtesy than of right, with the exception of personal inviolability, which he possesses from the moment he starts to fulfil his mission. On the departure of a minister he has a similar formal audience to present his *Letters of Recall*. It was once a custom to give presents to departing diplomatists; and during the seventeenth century a good deal of energy seems to have been spent in quarrels about them; for if the representative of one sovereign imagined that what he had received was of less value than what had been given to the representative of another sovereign, he deemed his master insulted and made the court ring with his complaints. Some powers, the United States being one of them, have forbidden their diplomatic agents to receive these formal and official parting gifts, and they have now fallen into disuse.

There are numerous ways in which a diplomatic mission can be terminated. It comes to an end by the death or recall of the minister, or by the expiration of the time fixed for the duration of the mission, or by the success or failure of its special purpose, or by the return of the regular minister to his post in cases where a minister has been accredited

*ad interim.* The death of the sovereign to whom the diplomatic agent is accredited, or the death of his own sovereign, terminates the mission in the case of monarchical states; but the election of a new chief magistrate of a Republic makes no difference in this respect. If a minister is sent away in consequence of having given grave offence, or if he goes away in consequence of having received grave offence, whether offered to himself personally or to the state which he represents, his mission is in both cases brought to an end. Moreover it is technically terminated by a change in his diplomatic rank; but in such a case he presents at the same time his Letters of Recall in his old capacity and his Letters of Credence in his new capacity, and thus commences a new official life at the moment of the dissolution of his former one. Strictly speaking the death of a diplomatic minister terminates all the immunities enjoyed by those dependent on him; but kindness and courtesy demand that they be continued for a limited time to his widow and children, in order to give them the means of winding up his affairs and removing from the country.<sup>1</sup>

### § 148.

In addition to its purely diplomatic agents each civilized state maintains in the territory of its neighbors commercial agents, called *Consuls*, whose duty it is to assist merchants and seamen of the country which employs them, and generally to further the interests of its commerce. They are not clothed with the diplomatic character, neither are they concerned with public affairs. They are appointed by the sovereign of the country whose agents they are, and they receive from the Foreign Office of the state where they reside a document called an *Exequatur*, which authorizes them to act as Consuls in that state, and to hold official communication with

Consuls — their position and immunities.

<sup>1</sup> C. de Martens, *Guide Diplomatique*, Ch. IX.

the functionaries of its home administration. They may be natives of the country which uses their services, or natives of the country in which they fulfil their duties, or natives of third countries domiciled in the country where they act. They are often engaged in trade; but some states forbid the members of their regular Consular Service from engaging in mercantile transactions on their own account. In Mohammedan countries, and in the East generally, Consuls are placed by treaty stipulations on a very different footing from that which they occupy in Western states. They exercise jurisdiction, as we saw when dealing with the subject,<sup>1</sup> over citizens of the state whose agents they are, and in the exercise of this jurisdiction judicial functions necessarily fall upon them. In order to protect them they have a large share of the diplomatic immunities denied to Consuls elsewhere. In times of disturbance or popular violence their Consulates are used as places of refuge for their compatriots and for others whose lives are in danger; and when the flag of their country is hoisted over these buildings they are held to be inviolable. Moreover it seems that in several of the South and Central American Republics Consuls are used as agents for political purposes and accredited as *Chargés d'Affaires*. In such cases the diplomatic character attaches to them and the consular character is merged in it. They gain the immunities of public ministers and must be treated as such. But these cases are exceptional and anomalous. The general rule about Consuls is that they are commercial, not diplomatic, agents. They are under the local law and jurisdiction, and their residences are not held to be exempt from the authority of the local functionaries. But as a matter of comity which can hardly be distinguished from strict right the official papers and archives of the consulate are not liable to seizure, and soldiers may not be quartered in its buildings, nor may the Consul himself be compelled to serve in the army or militia.<sup>2</sup>

<sup>1</sup> See § 131.    <sup>2</sup> Halleck, *International Law* (Baker's ed.), II., 313 *et seq.*

## § 149.

Several times already we have had occasion to mention that diplomatic ministers resident at foreign courts possess many immunities. Speaking generally we may say that they and their suites are exempt from the local jurisdiction. A good deal of doubt exists as to the exact limits of their exemption; but the reason for its existence is clear. An ambassador could not attend to the interests of his country with perfect freedom and absolute fearlessness, if he were liable to be dealt with by the local law and subjected to the authority of the officers of the state to which he was sent. In considering the nature and extent of diplomatic privileges it will be convenient to divide them into *Immunities connected with the Person* and *Immunities connected with Property*, and to consider each class separately, though the line of demarcation between them is not always easy to draw.

Diplomatic immu-  
nities — their  
general nature and  
the reason for their  
existence.

## § 150.

*Immunities connected with the Person* are granted in the fullest degree to public ministers and those of their suite who possess the diplomatic character and therefore hold a privileged position in their own right, and in a lesser measure to the minister's wife, children, private secretary, chaplain and servants, who are necessary for his comfort and convenience, but do not belong to the diplomatic service of his country. With regard to all matters settled by the *lex domicilii*, the legal position of diplomatic agents resident abroad is that of persons resident in their own country. As to their private rights and obligations, they are subject to the law of the state which sends them; and all children born to them abroad are held to be subjects of their own country. They cannot be arrested unless they are actually engaged in plot-

Immunities con-  
nected with the  
person of the dip-  
lomatic agent.



ting against the security of the state to which they are accredited, and even in such an extremity application for their recall should first be made unless the matter is too urgent for delay. This view of the law is upheld by the case of Count Gyllenborg, which occurred in 1717. He was Swedish Ambassador to England, and while acting in that capacity had made himself one of the prime agents in a conspiracy to overthrow George I. and set the old Pretender on the English throne. The Courts of Sweden and Spain were concerned in the plot along with the English Jacobites, and one of its leading features was the invasion of Scotland by 12,000 Swedish troops. The British Government obtained a clue to the conspiracy by intercepting some letters. They therefore arrested Gyllenborg and seized his diplomatic documents, in which they found full proof of all they had suspected. In consequence they detained the Count as a prisoner, till he was exchanged for the English Ambassador to Sweden, who had been arrested in retaliation. The ministers of foreign powers in London protested against Gyllenborg's arrest as a breach of International Law ; but when the reasons for it were explained to them, all except the Spanish Ambassador professed themselves satisfied ; and, as Spain was one of the parties to the plot, its protests were of little value.<sup>1</sup> There can be no doubt that the British Government was right in the main, though in these days a minister in Gyllenborg's position would merely be escorted out of the country. In the very next year the French Regent ordered the arrest of the Prince of Cellarmare, the Spanish Ambassador at Paris, who had been engaged in a conspiracy to seize the Duke of Orleans and proclaim the King of Spain Regent of France in his stead, with the Duke of Maine as Deputy.<sup>2</sup> On this occasion no protests were made by third powers ; and the two cases together may be held to have

<sup>1</sup> Ward, *History of the Law of Nations*, II., 548-550 ; C. de Martens, *Causes Célèbres*, I., 75-138.

<sup>2</sup> C. de Martens, *Causes Célèbres*, I., 139-173.

conclusively established the doctrine that a foreign minister's inviolability does not extend to cover acts done against the safety of the Government to which he is accredited. It must, however, be remembered that he may not be tried and punished by the offended state. It has no jurisdiction over him; and its right to deal forcibly with him at all is based upon and limited by considerations of safety and self-defence.

Visitors and hangers-on of the embassy do not possess the privilege of personal inviolability, but come under the jurisdiction of the state in whose territory they are. This was settled by a case which arose in 1653. In that year Don Pantaleon Sa, the brother of the Portuguese Ambassador in England, committed murder under circumstances of peculiar atrocity. He got into a quarrel at the London Exchange with Colonel Gerhard, and set upon him with a band of attendants. The Colonel was, however, rescued; but the next night Sa came to the Exchange with fifty armed Portuguese, and commenced a general attack on all who were there, one man being killed and several wounded before the horse-guards came and put down the riot. The Ambassador gave up the delinquents, but Don Pantaleon declared that he was clothed with the diplomatic character, and claimed to be under no jurisdiction but that of the King of Portugal. It was, however, shown that he was not an ambassador at the time, but had only received from his sovereign a promise that he should be accredited as Ambassador on the recall of his brother, which was momentarily expected. His brother, the real Ambassador, interceded for him; but Cromwell allowed the law to take its course, and he was tried, convicted and hung.<sup>1</sup> His real position seems to have been somewhat doubtful. He certainly was not the head of the Portuguese Legation, and therefore Hale is mistaken in supposing that his case supports the contention that an ambassador may be tried for murder.<sup>2</sup> If he is to be re-

<sup>1</sup> Ward, *History of the Law of Nations*, II., 535-546.

<sup>2</sup> Hale, *Pleas of the Crown*, I., 99.

garded as a member of his brother's suite, all we can say is that International Law has developed since his time and would not now permit a trial and execution under similar circumstances by the authorities of the state where the crime was committed. But if he was simply a visitor at the embassy, he would not be protected by diplomatic immunity to-day any more than he was two hundred and forty years ago.

A public minister is free from legal process as well as from personal restraint. He cannot be compelled to appear in court and plead; but if he chooses to waive his privilege, the courts will deal with him either as plaintiff or defendant. Having submitted himself to their jurisdiction, he is bound to go through all that is needful to the due conduct of the case. He cannot, for instance, refuse to answer awkward questions in cross-examination on the plea of diplomatic immunity. The question whether he may waive his privileges himself, or whether his Government is alone competent to do so, is one to be decided, not by International Law, but by the law of each separate state for its own diplomatic agents. If the evidence of the minister of a foreign power is required in an important case, he must be requested to appear and give it; but he cannot be compelled to do so. Rather than defeat the ends of justice ambassadors will generally consent to waive their immunity and give the required testimony. But in 1856 the Dutch Minister at Washington, who was an essential witness in a case of murder, refused to appear in open court, though he was willing to make a deposition on oath. His Government declined to order him to give evidence publicly, and the United States demanded his recall in consequence; but they could not force him to appear and testify.<sup>1</sup> At the trial of Guiteau for the assassination of President Garfield, the Minister of Venezuela appeared as a witness and gave his testimony in open court.<sup>2</sup>

<sup>1</sup> Wheaton, *International Law* (Lawrence's ed.), pp. 393, 394.

<sup>2</sup> Wharton, *International Law of the United States*, § 98.

When permanent legations were first established by states at one another's courts, many extreme pretensions were put forward by ambassadors, and among them was the claim to exercise civil and criminal jurisdiction over the members of their suites according to the laws of their own country. But in modern practice no such right is conceded, and it would not now be demanded. In civil matters the utmost a diplomatic minister can do is to authenticate testaments and contracts made before him by members of his suite ; and his chaplain may solemnize marriages between subjects of the state which has accredited him in the chapel of the embassy, if the laws of their country allow it ; but there is great doubt and great diversity of practice with regard to the marriage of foreigners, or marriages between a subject of the ambassador's state and a foreigner.<sup>1</sup> In criminal matters which arise between members of his suite, the head of the legation takes and prepares the evidence, but sends the accused home for trial ; and he possesses a similar power as to the servants of the embassy, though its limits are uncertain and disputable.

There has been, and still is, some difference of opinion among jurists as to whether a diplomatic agent, travelling to his destination through the territories of third powers at peace with his sovereign, is entitled within them to full personal inviolability, or whether he can expect only the protection given to an ordinary traveller. Probably as a matter of strict right the latter is all that can be demanded ; but the comity of nations would dictate the recognition of the ambassadorial character and the protection of the foreigner clothed with it from all molestation on his passage through the territory to his proper destination, though it may well be doubted whether immunity should be granted to him if he made a stay of considerable length in the country. A belligerent can, of course, capture his enemy's ambassadors in any place where it is lawful for him to carry on hostili-

<sup>1</sup> Hall, *International Law*, pp. 181, 182, and note.

ties, unless he has himself provided them with a safe-conduct. It seems to be settled that Commissioners appointed in accordance with treaty stipulations for special purposes, such as the marking out of a frontier or the superintendence of a military evacuation, have no right to diplomatic immunities. A British Commissioner appointed under the Treaty of 1794 was tried for an offence against the local law by an American court at Philadelphia, and the English Government made no complaint.<sup>1</sup>

The immunities of the members of a diplomatic minister's family and household are granted to them because his comfort and dignity could not be properly provided for unless they were free to a great extent from the local jurisdiction. His wife not only shares his personal inviolability, but is also a partaker of the ceremonial honors paid to him. His children occupy a similar position; and his chaplain and private secretary are certainly free from arrest, as also are the messengers and couriers attached to the embassy. It is generally held that the regular servants of the minister, as distinct from such persons as workmen temporarily employed about the premises or individuals who give up but a small portion of their time to their duties in connection with embassy, are exempt from the local jurisdiction. But there is no uniform practice as to the extent of their immunities, nor is there any agreement among the authorities as to what their privileges ought to be. The law of England on the subject, as embodied in a statute<sup>2</sup> which is always held by British judges to be declaratory of the law of nations, declares void all writs and processes issued against them, unless they are traders. But in criminal matters the British authorities claim a right to exercise jurisdiction over the servants of the embassy, if the offence is committed outside the minister's residence. In most countries they would not be arrested without the special permission of the ambassador;

<sup>1</sup> Wharton, *International Law of the United States*, § 93 a.

<sup>2</sup> 7 Anne, c. 12.

and in modern times difficulties are generally prevented by the exercise of tact and judgment. If the servant of a public minister commits a criminal offence, his master either dismisses him from his service, and thus puts an end at once to all claim for immunity, or hands him over to the local authorities to be dealt with according to their law. Only when the offence is a serious one, and is committed within the residence of the minister, does he, as a rule, arrest the perpetrator and send him home for trial. In civil cases he grants permission for his servants to be proceeded against in the local courts. In order to avoid misunderstandings and controversies as to the persons entitled to immunity, most states require the heads of the foreign legations to send periodically to the Secretary for Foreign Affairs a list of the members of their suites and the servants in their employ.

### § 151.

*Immunities connected with Property* apply first and foremost to the official residence of the ambassador, usually called his Hotel. It is generally regarded as inviolable except in cases of great extremity. The fiction of ex-territoriality is sometimes applied to it, and it is held to be a portion of the state to which its occupant belongs. But, as in other cases, so in this, the theory is a clumsy attempt to account for what is better explained without it. If it were true, the Hotel could in no case be entered by the local authorities; whereas it is universally admitted that the extreme circumstances which justify the arrest of a diplomatic minister of a foreign power and the seizure of his papers, justify also forcible entry into his Hotel and its search by the officers of the state to which he is sent. Moreover it is now settled that in European countries ambassadors do not possess a right of giving asylum in their residences to criminals and refugees, though in the last century they were disposed

Immunities connected with the property of the diplomatic agent.

to claim it. There appears, however, to be a binding custom in favor of harboring political refugees in the South and Central American states, and in Oriental countries. The frequent revolutions in the former group of states, and the barbarous treatment of political offenders in the latter, are held to justify a departure from the ordinary rule. The reception of Balmacedist refugees by Mr. Egan, the United States Minister, in the course of the Chilian revolution of 1891, is a case in point.<sup>1</sup>

Some states do not recognize the immunities of the ambassador's residence as existing to the extent usually claimed. France holds that the privileges of the Hotel do not extend to acts done within it affecting the inhabitants of the country in which it is situated.<sup>2</sup> Great Britain claims the right of arresting servants of the embassy within the precincts of the Hotel. This was clearly shown by a case which occurred in 1827, when the coachman of Mr. Gallatin, the American Minister in London, was arrested in his stable by the local authorities on a charge of assault committed outside the embassy. The attention of the British Foreign Office was called informally to the subject; and in reply it was asserted that the law did not extend "to protect mere servants of ambassadors from arrest upon criminal charges," and that the premises occupied by a diplomatic minister were not entitled to inviolability. The magistrates who issued the warrant were, however, told that they ought to have informed the Minister of what they had done, in order that his convenience might be consulted as to the time and manner of making the arrest.<sup>3</sup> The attitude of France and Great Britain in this matter is rather an exception to the general practice of states than an example of the enforcement of an ordinary rule. But it must be admitted

<sup>1</sup> *Correspondence accompanying President Harrison's Message of Jan. 25, 1892.*

<sup>2</sup> Hall, *International Law*, § 52.

<sup>3</sup> Wharton, *International Law of the United States*, § 94.

that the exact limits of the inviolability of the Hotel are ill-defined. The ambassador is free from the payment of taxes levied upon it, whether for purposes of state or for the maintenance of municipal government ; but if the charge for such commodities as light and water takes the form of local taxation, he would be expected to meet the demands for them, just as he is expected to pay the bills for the provisions consumed by his household, though he cannot be compelled to do so, since his person is inviolate and his house and goods exempt from legal process. The other official property of the embassy shares the immunities of the Hotel. It may not be seized, distrained upon, or dealt with in any way, except in extreme cases of state necessity.

Among the privileges covered by the principle of the general inviolability of the official residence of the legation one of the most important is the celebration of divine worship within it in the form desired by the ambassador, even though it is proscribed by the country in which he resides. But he may not give public notification of the services by ringing a bell or in any other way, nor may he allow subjects of the country to which he is accredited to be present, if attendance at such worship is forbidden by their law.

Some writers<sup>1</sup> hold that diplomatic ministers are liable to suits in the local tribunals, and other processes under the law of the country to which they are accredited, in all cases in which their private property in that country is concerned. Their transactions as traders, executors, trustees, or indeed in any capacity but their official one, are held to render them amenable to the local jurisdiction as far as those transactions are concerned. It is, of course, admitted that the person of a diplomatic agent is inviolable ; and therefore the doctrine amounts to no more than an assertion that he must submit to proceedings directed against the property, in such cases as we have described. It may be

<sup>1</sup> For example, Woolsey, *International Law*, §§ 92, 96 ; Calvo, *Droit International* § 592.



doubted, however, how far this view is consistent with sound principle or borne out by practice. The law of the United States prohibits the service of writs upon the resident ministers of foreign states, and considers those who sue out or enforce processes against them as guilty of an indictable offence, even though they are ignorant of their diplomatic character.<sup>1</sup> In England not only are the persons of diplomatic ministers inviolable, but all writs and processes whereby "their goods and chattels may be distrained, seized or attacked" are "utterly null and void," and all concerned in obtaining such writs or processes are subject to severe punishment.<sup>2</sup> The law of other leading countries contains similar provisions; and though cases can be found in favor of drawing a distinction between the private and the official property of a public minister, they are not of recent date. In 1720 the Envoy of the Duke of Holstein in Holland had all his goods, except what were official in their nature, seized for debts contracted by him in the course of trade; but his treatment can hardly be quoted as a precedent to-day.<sup>3</sup> Dana forcibly points out<sup>4</sup> the inconvenience to a minister of being obliged to appear and litigate, lest judgment should go against him by default. The extension of diplomatic immunities to all property possessed by the agents of foreign countries does not leave those who might suffer in consequence of it absolutely helpless. Most states now forbid their representatives abroad to engage in trade, and, as to other matters, the remedy by diplomatic complaint or an appeal to the courts of the ambassador's own country will generally be sufficient.

Goods sent from abroad for the use of an embassy are generally admitted duty free. But the privilege is granted rather as a matter of comity than of right. Precautions

<sup>1</sup> Wharton, *International Law of the United States*, § 98.

<sup>2</sup> 7 Anne, c. 12.

<sup>3</sup> Bynkershoek, *De Foro Legatorum*, Ch. XVI.

<sup>4</sup> Note to Wheaton's *International Law*, p. 307.

may be taken against the abuse of it, and on proof that it has been used to cover a contraband trade it may be withdrawn.

### § 152.

We will now pass on to consider the treaty-making power and its methods of action, in so far as they are dealt with by International Law. In each state the right of making treaties rests with those authorities to whom it is confided by the political constitution. As long as there is some power in a country whose word can bind the whole body politic, other states must do their international business with it, and have no right to inquire into its nature and the circumstances of its creation. But other important matters connected with treaties are of international concern. The first of these to be discussed is

The treaty-making power. Ratification of treaties.

#### *The nature and necessity of ratification.*

Ratification is a formal ceremony whereby, some time after a treaty has been signed, solemn confirmations of it are exchanged by the contracting parties. No treaty is binding without ratification, unless there is a special agreement to the contrary. The full powers given to Plenipotentiaries must be understood as conferring a right to conclude agreements subject to the ultimate decision of the governments which they represent. Sometimes, however, it is agreed that certain preliminary engagements in a treaty shall take effect immediately, without waiting for the exchange of ratifications, as was the case with the Treaty of London of 1840 for the settlement of the Egyptian Question. A reserved protocol annexed to it stipulated that the preliminary measures mentioned in the second article should be carried out at once.<sup>1</sup> But when a treaty is ratified, its legal effects are held to date from the moment of signature, unless, as

<sup>1</sup> Holland, *European Concert in the Eastern Question*, pp. 90-97.

was the case with the Treaty of Paris of 1856, it is agreed that they shall come into force from the moment of ratification.<sup>1</sup> To this rule Treaties of Cession are an exception; for it is undoubted law that they commence to operate from the time of the actual transfer of the ceded territory.<sup>2</sup>

The question whether a state is bound to ratify a treaty signed by its lawful representatives is sometimes argued at great length by text-writers. But a reference to practice robs it of its difficulties. When the ratifying power and the treaty-making power are placed by the constitution of a state in different hands, there cannot be the slightest obligation, moral or legal, for it to ratify. Other states know that the approval of two authorities has to be gained for a diplomatic instrument before it can be considered as agreed to, and they take their measures accordingly. The Senate of the United States has frequently refused to ratify treaties made by the executive power. In 1885, for instance, it refused its assent to a treaty with Nicaragua for a construction of a ship-canal between the Atlantic and the Pacific, and in 1888 it threw out a Fishery Treaty which had been negotiated with Great Britain. But when the treaty-making power and the ratifying power are vested in the same hands, it is held that some reason should be forthcoming to justify a refusal to ratify. If the negotiators have exceeded their powers, if any deceit as to matters of fact has been practised upon them, or if circumstances have entirely changed since the treaty was signed, there can be no doubt that a state is quite within its rights in declining to give the last formal sanction which calls the stipulations of its agents into operation. But modern practice seems to go further, and gives support to the theory that the time between signature and ratification is granted to the parties for the purpose of thinking the matter over, and that if a state changes its mind in the interval from any reason

<sup>1</sup> Holland, *European Concert in the Eastern Question*, p. 244.

<sup>2</sup> Twiss, *Law of Nations*, I., § 251.

that is at all distinguishable from mere caprice, it may refuse to complete the bargain by ratification. Thus the King of Holland refused in 1841 to ratify a commercial treaty he had concluded as Grand Duke of Luxemburg, on the ground that since he had signed it he had become convinced that it would injure the trade of its subjects,<sup>1</sup> and in 1884 Great Britain dropped an agreement she had concluded in 1883 with Portugal concerning the mouth of the Congo, the reasons being that its provisions were very far from satisfying the traders and others immediately concerned, and that it was proposed to settle the question along with many other similar questions at a great International Conference.<sup>2</sup>

### § 153.

Next among the matters of international concern connected with formal agreements between states we may mention

#### *The rules of interpretation to be applied to treaties.*

A vast amount of misplaced ingenuity has been expended on this subject. Vattel devotes a whole chapter to it, and obtains as the result such rules as "It is not permitted to interpret what has no need of interpretation" and "We ought to take figurative expressions in a figurative sense."<sup>3</sup> But since states have no common superior to adjust their differences and declare with authority the real meaning and force of their international documents, it is clear that no rules of interpretation can be laid down which are binding in the sense that the rules followed by a court of law in construing a will or a lease are binding on the parties concerned. "There is no place for the refinements of the courts in the rough jurisprudence of nations."<sup>4</sup>

<sup>1</sup> Twiss, *Law of Nations*, § 251.

<sup>2</sup> Speech of Mr. Gladstone in House of Commons, March 12, 1885; see *Hansard*, 3d Series, Vol. CCXCV., 975.

<sup>3</sup> *Droit des Gens*, II., xvii.

<sup>4</sup> Hall, *International Law*, p. 340, note.

We can hardly venture to go beyond the statements that ordinary words must be taken in an ordinary sense and technical words in a technical sense, and that doubtful sentences and expressions should be interpreted by the context, so as to make the treaty homogeneous and not self-contradictory. But when states get into controversy about the interpretation of a treaty, they often make a new agreement, clearing up the disputed points in the way that seems most convenient at the time, which is not always the way pointed out by strict rules of interpretation.

### § 154.

The last point we have to consider in this connection is

#### *The extent to which treaties are binding.*

The ancient and mediæval fashion of giving pledges and hostages for the fulfilment of treaties has passed away, and states now rely upon their own power, and upon considerations of self-interest and feelings of duty, to secure the observance of engagements entered into with them. In the eye of International Law treaties are made to be kept. Their obligation is perpetual, unless a time is limited in their stipulations or they provide for the performance of acts which are done once for all, such as the payment of an indemnity or the cession of territory. That they were extorted by force is no good plea for declining to be bound by them. Most treaties of peace are made by the vanquished state under duress; but there would be an end of all stability in international affairs if it were free to repudiate its engagements on that account whenever it thought fit. The only kind of duress which justifies a breach of treaty is the coercion of a sovereign or plenipotentiary to such an extent as to induce him to enter into arrangements which he would never have made but for fear on account of his personal safety. Such was the renunciation of the Spanish crown extorted by Napoleon at Bayonne in 1807 from

The obligation  
of treaties.

Charles IV. and his son Ferdinand.<sup>1</sup> The people of Spain broke no faith when they refused to be bound by it and rose in insurrection against Joseph Bonaparte, who had been placed upon the throne.

But though the obligations of treaties, with the exceptions just mentioned, are perpetual as far as the utterances of International Law are concerned, it is clear that they cannot remain unchanged forever. No one now proposes to go back to the Treaties of Münster or of Utrecht, and few would consider it desirable to return to the stipulations enacted at Vienna after the downfall of the first Napoleon. As circumstances alter the engagements made to suit them go out of date. When, and under what conditions, it is justifiable to disregard a treaty, is a question of morality rather than of law. Each case must be judged on its own merits. It is impossible to lay down a hard and fast rule, such as was embodied, at the Conference held at London in 1871 to settle the Black Sea Question, in the words, "It is an essential principle of the Law of Nations that no power can liberate itself from the engagements of a treaty, nor modify the stipulations thereof, unless with the consent of the contracting powers by means of an amicable arrangement."<sup>2</sup> This doctrine sounds well; but a little consideration will show that it is as untenable as the lax view which would allow any party to a treaty to violate it on the slightest pretext. If it were invariably followed, a single obstructive power would have the right to prevent beneficial changes which all the other states concerned were willing to adopt. It would have stopped the unification of Italy in 1860 on account of the protests of Austria, and the consolidation of Germany in 1866 and 1871 because of the opposition of some of her minor states. International Law certainly does not give a right of veto on political progress to any reactionary member of the family of nations who can dis-

<sup>1</sup> Fyffe, *Modern Europe*, I., 367-370.

<sup>2</sup> British State Papers, *Protocols of London Conference, 1871*, p. 7.

cover in its archives some obsolete treaty, on the fulfilment of whose stipulations it insists against the wishes of all the other signatory powers. In truth these questions transcend law. They are outside its sphere ; and its rules do not apply to them. Moreover it must be remembered that sometimes provisions are inserted in a treaty more for show and to soothe wounded susceptibilities, than with any serious intention of having them carried into effect. Such was the stipulation in the Treaty of Berlin in 1878 that Turkey should garrison the Balkan passes with her troops, who should have for that purpose only a right to pass through Roumelia.<sup>1</sup> It was well known that the people of that province would not allow the Ottoman soldiers to pass and repass peaceably, and the Porte was not expected to exercise, and never did exercise, the right given to it on paper. A stipulation of the great International Treaty of Berlin was thus ignored from the beginning, and the consent of the contracting parties was never even asked ; yet no accusations of bad faith have been bandied about, and the strictest moralists would hardly venture to say that the provision should have been acted upon at the risk of kindling another war. Each case has circumstances that are peculiar to it, and we must judge it on its own merits, bearing in mind on the one hand that good faith is a duty incumbent on states as well as individuals, and on the other that no age can be so wise and good as to make its treaties the rules for all succeeding time.

<sup>1</sup> Holland, *European Concert in the Eastern Question*, p. 289.

# PART III.

## THE LAW OF WAR.



### CHAPTER I.

#### THE DEFINITION OF WAR AND OTHER PRELIMINARY POINTS.

§ 155.

WAR may be defined as *A contest carried on by public force between states, or between states and communities having with regard to the contest the rights of states.* Some of the earlier authorities regarded war as a condition. Grotius, for instance, defines it as *Status per vim certantium, qua tales sunt*,<sup>1</sup> which Whewell translates as “the state of those contending by force, as such.” But we speak of states as being belligerent, and thus indicate their condition, while we reserve the word “War” for the series of hostile acts which take place during belligerency. War is a contest, not a condition; and moreover it is restricted to contests carried on under state authority directly or indirectly given. Private war has long ago disappeared from civilized societies. If individuals now attempt to redress their real or fancied wrongs by the might of their own hands, they are regarded by the law as disturbers of the public peace,

<sup>1</sup> *De Jure Belli ac Pacis*, I., I., II.



and their act is an offence in itself, however gross may have been the injury which brought it about. It sometimes happens that a commander at a distance from his own country and without means of communicating immediately with his Government deems such a serious emergency to have arisen as will necessitate hostile acts on his part against the local rulers and their subjects. If his proceedings are adopted and ratified by his Government, they are state acts from the first, and constitute a regular war : if they are disavowed, they are acts of unauthorized violence for which reparation must be given. A war such as was waged in the autumn of 1893 by the armed forces of the British South African Company against Lobengula, King of the Matabele, and his tribe, is indirectly a state act, inasmuch as it is carried on by a chartered corporation under authority granted by the state. Whatever may be thought of the policy of allowing private associations to exercise many of the powers and prerogatives of sovereignty in their dealings with barbarous races, it is clear that the international responsibility for their wars belongs to the state which has delegated to them so many of its functions. Their force is its force ; their wars are its wars ; and their political arrangements are its political arrangements. All war is now public war. Even the military and naval operations of revolted provinces or colonies have a public character impressed upon them by the process known as Recognition of Belligerency ;<sup>1</sup> so that the dictum of Grotius that civil war is public on the part of the government and private on the part of the rebels<sup>2</sup> is no longer applicable. The other distinctions between different kinds of war are either unmeaning or obsolete. A formal war was one carried on by public authority and declared with due formality, whereas an informal war wanted both these characteristics. But we have just seen that all modern wars are waged by the authority of the sovereign power in

<sup>1</sup> See §§ 162, 163.

<sup>2</sup> *De Jure Belli ac Pacis*, I., III., I.

the state, and we shall soon see that no formal declarations of war are now required. In a perfect war the whole state was placed in the legal condition of belligerency, and in this sense of the term all wars are now perfect. An imperfect war was limited as to persons, places and things ; and all wars are now limited to combatants so far as active hostile operations are concerned, and must of necessity be limited as to places and things since no power can cover the whole of the possible area of hostilities with its armed forces. Again, war was said to be offensive on the part of the aggressor in the struggle, and defensive on the part of those on whom the quarrel was fastened ; and a distinction of the same kind was signified by the contrast between just and unjust wars, when it was not meant to convey the ideas set forth by the terms "formal" and "informal."<sup>1</sup> But modern International Law knows nothing of these moral questions. It does not pronounce upon them : it simply ignores them. To it war, whether just or unjust, right or wrong, is a fact which alters in a great variety of ways the relations of the parties concerned. It must, therefore, be defined and its legal incidents set forth. Law will tell us how the relation of belligerency is created, and what are the rights and obligations of belligerents towards each other and towards neutrals ; but we look to ethical discussions for guidance upon the moral questions which occupy such a large space in the writings of the early publicists. Grotius, for instance, endeavors to classify the just causes of war, after having decided that war is not necessarily wrong, mainly by the process of confusing it with capital punishment.<sup>2</sup> Such questions as these are worthy of the most careful consideration ; but they are as much out of place in a treatise on International Law as would be a discussion on the ethics of marriage in a book upon the law of personal *status*.

<sup>1</sup> Halleck, *International Law*, Ch. XVI.

<sup>2</sup> *De Jure Belli ac Pacis*, I., II., and II., I., XX.-XXVI.

## § 156.

War must be distinguished from certain methods of applying force which are held not to be inconsistent with the continuance of peaceful relations between the powers concerned, though the distinction is found in the intent of the parties rather than in the character of the acts performed. In so far as the power against which these latter are directed is concerned, they are exactly the same as would be resorted to in the case of warlike operations. But the parties to them do not choose to regard themselves as belligerents, and do not claim to subject other states to the burdens and disabilities of neutrals. The diplomatists on both sides continue their work, non-combatants are not obliged to suspend commercial intercourse at places outside the area of the forceful proceedings, and the legal concomitants of a state of peace continue to exist. The modes of putting stress upon an offending state which are of a forceful and violent nature, though they are said to fall short of actual war, may be classified under the heads of Reprisals, Embargo and Pacific Blockade.

Modes of putting stress upon a state by violence which is not held to amount to open war.

## § 157.

We will first deal with

*Reprisals.*

The term is used in a bewildering variety of senses. Sometimes it means nothing more than a resort to the *lex talionis* in warfare. A commander who shoots the mayor of an occupied town in retaliation for the murder of his sentinels by the inhabitants resorts to an act of reprisal; but it is an incident of warfare, not an attempt to bring an offending state to terms by an exercise of force which does not amount to war. Again, we sometimes read of Negative Reprisals or Retortion; but these

Reprisals.

are carried on by adopting towards a state which is acting in an unfriendly, though peaceful, manner a similar line of conduct to that complained of in it. They take place, for instance, when differential duties are levied by one state upon the products of another which has discriminated against the former in its tariff; and it is quite clear that they have no connection with force or war. The older publicists make mention of yet another form of Reprisal. They describe as Special Reprisals a method frequently resorted to in the Middle Ages, and sometimes in later periods, for the indemnification of private individuals for injuries and losses inflicted by subjects of other nations. Letters of Marque were issued by the sovereign to those who had been wronged, and they were thereby authorized to recoup themselves by capturing vessels and cargoes of the offending nationality. With the rise of modern notions of state responsibility and the increase of the power of governments these Special Reprisals have fallen into disuse. The wronged individual would now be told by the rulers of his country that they would endeavor to obtain redress for him from the rulers of the country to which the offender belonged. A diplomatic correspondence would ensue, and, if the complaint was well founded, redress would in all probability be given. But the transaction would be one between the states concerned, and the individuals with regard to whom the case arose would do no more than communicate each with his own Government. The only kind of Reprisals of a forceful character known to modern International Law is what used to be called by way of distinction General Reprisals. They take place when a state which deems itself aggrieved sends its public armed forces to seize and destroy property belonging to the offending state or its subjects in the territory of the latter state, in its waters or on the high seas. One of the most recent instances is afforded by the hostile acts of France against China in 1884 and 1885. The French Government felt aggrieved by the constant presence of bands of

Chinese among the forces of Tonquin, which it was then engaged in subduing. It deemed the excuses and promises of the Chinese authorities to be delusive; but it did not wish to take the extreme measure of waging regular war against China. It, therefore, adopted what the French Prime Minister, M. Jules Ferry, described as a policy of intelligent destruction. A French fleet bombarded the arsenal of Foo-Chow and took possession of certain points on the Chinese island of Formosa; but negotiations were going on all the while with China, the diplomatic ministers were not withdrawn, and a state of war was not held to exist between the two countries.<sup>1</sup> The violence resorted to on this occasion has been very generally deemed extreme. The usual practice is to seize vessels, but not to attack places or devastate territory.

### § 158.

We have next to describe

#### *Embargo,*

considered as a means of bringing an adversary to reason without resorting to actual war. Here too, as in the case of Reprisals, we must begin by drawing distinctions. Embargo pure and simple is nothing more than the detention of ships in port; and it may be put in force for good reason by a state against its own vessels, as was done by the United States in 1807, when to avoid the violent action of both French and English cruisers neutral American merchantmen were for a time prevented from leaving American ports by the act of their own Government.<sup>2</sup> A detention of this kind is called Pacific Embargo, and it has no necessary connection with any attempt to obtain redress for

Embargo.

<sup>1</sup> *Annual Register for 1884*, pp. 280, 281, 369-376; *Annual Register for 1885*, pp. 206-214, 330-335.

<sup>2</sup> Wharton, *International Law of the United States*, § 320.

injuries received. When merchant vessels of the offending state are detained in the ports of the state which deems itself aggrieved, we have an instance of such an attempt, and it is called Hostile Embargo. Some writers regard it as a kind of Reprisal; but there is a distinction between the two in that the former consists of seizures in the waters of the offended state, and the latter of seizures on the high seas and in the ports of the state which gives the provocation. The legal effects of Hostile Embargo were stated by Lord Stowell in a luminous judgment in the cases of the *Boedes Lust*,<sup>1</sup> which arose in 1803. After the rupture of the Peace of Amiens, Great Britain had good reason to believe that Holland was only waiting for an opportunity in order to join France against her. An Embargo was, therefore, laid upon all Dutch vessels in British ports with the object of inducing Holland to give up her alliance with Napoleon. Its effect was just the contrary. War broke out, and the question of the legal effect of the original seizure of the Dutch vessels came before a Prize Court. Lord Stowell laid down that Hostile Embargo was at first equivocal in its legal aspects and its real character was determined by the events that followed it. If war broke out, its commencement had a retro-active effect and made the seizure belligerent capture from the first. If satisfaction was given and friendship restored between the two states, the original seizure amounted to nothing more than civil detention and worked no disturbance of proprietary rights. Up to and during the last century Hostile Embargo was often resorted to in contemplation of hostilities. If a state found in its ports a considerable number of vessels belonging to a probable adversary, it was apt to seize the opportunity and lay hands upon them before the actual outbreak of war. The growth of commercial interests, and possibly a quickened sense of justice, have caused the practice to be discontinued; and in modern times the merchant vessels of the enemy found in port at the commencement of

<sup>1</sup> Robinson, *Admiralty Reports*, V., 244-251.

hostilities are generally allowed a fixed period in which to depart without molestation.

### § 159.

The comparatively modern practice termed

#### *Pacific Blockade.*

must now be considered. The first instance of it occurred in 1827, when Great Britain, France and Russia blockaded the coasts of Greece in order to induce Turkey, with whom they remained at peace, to accept their mediation in its war with its revolted Greek subjects. From that time onwards Pacific Blockades have been resorted to at intervals, as a means of putting pressure to bear upon states with whom it was not deemed necessary or desirable to resort to regular hostilities. Publicists have been greatly divided as to the legality of the practice. The true test of its consonance with accepted principles is to be found in the nature of the treatment accorded to vessels of third powers by the blockaders. If the commerce of states unconnected with the quarrel is forcibly stopped, an illegal act is done, since no power has the right to prevent the ships of other powers from trading in time of peace with ports opened to them by the local sovereigns. But if no trade other than that of the blockading and the blockaded powers is molested, it is impossible to say that any international offence is committed. The parties immediately concerned must be allowed to settle their disagreement in their own way, as long as they do not interfere with the rights of those who have no concern with the matter in dispute. These principles have been fully established by the last two cases that have arisen. In 1884 the French established what they regarded as a Pacific Blockade of part of the coast of Formosa, as an incident of their operations for reducing China to terms without a resort to open war ; but, inasmuch as they claimed a right to capture vessels of third powers, Great Britain protested. The

French Government declared that its public armed ships would not resort to search and capture on the high seas, but would seize any merchantman, whether of Chinese or other nationality, which attempted to enter the blockaded ports; and Earl Granville, who was then the English Secretary for Foreign Affairs, replied that in that case Great Britain was obliged to hold that a state of war existed between France and China, and must put in force her neutrality regulations in the ports of Singapore and Hong-Kong. In consequence of this France claimed and exercised full belligerent rights against neutrals; but the matter was settled almost immediately by the restoration of normal pacific relations with China.<sup>1</sup> In 1886 the Great Powers, with the exception of France, established a Pacific Blockade of the coasts of Greece, in order to prevent the Greeks from making war upon Turkey and thus precipitating a great European struggle. The allied fleets were instructed to detain all vessels under the Greek flag attempting to run the blockade, but it was added that even Greek ships were not to be seized when any part of their cargo belonged to subjects of a state other than Greece or the blockading powers, should such cargo have been shipped before notification of the blockade, or after notification but under a charter made before notification.<sup>2</sup> The blockade was raised in a few weeks in view of the pacific assurances of a new Ministry and the commencement of Greek disarmament; and while it lasted no protests were raised by states unconnected with it. In this respect it contrasts favorably with the French Blockade of Formosa two years before. The history of the two cases points unmistakably to the conclusion that Pacific Blockade is lawful, provided it is enforced against none but vessels of the power which is to be coerced by it; and on this condition it was approved in 1887 by the Institute of International Law.<sup>3</sup>

<sup>1</sup> British State Papers, *France*, No. 1 (1885), pp. 1-13; French State Papers, *Affaires de Chine* (1885), pp. 1-15.

<sup>2</sup> British State Papers, *Greece*, No. 4 (1886), p. 14.

<sup>3</sup> *Annuaire de l'Institut de Droit International*, 1887-1888, pp. 300, 301. Note, however, that the condition was not observed in the so-called Pacific Blockade of Crete by the ships of the Great Powers in 1897.



## § 160.

The power against which Reprisal, Embargo or Pacific Blockade is resorted to can, if it pleases, resort to war in return; and it is certain that any powerful and high-spirited nation would do so. Self-respect would forbid it to give way under violent and coercive pressure, thought it might have been willing to settle the question at issue after negotiation by some acceptable concession. But in cases where a strong state or group of states finds itself obliged to undertake what are practically measures of police against weak or barbarous powers, one or other of the means above described may be a useful alternative to war. They are less destructive and more limited in their operation. It is true that they may be used to inflict injury on small states and extort from them a compliance with unreasonable demands. But war can be equally unjust, and would certainly cause more suffering. There seems no reason to endeavor to banish from International Law its sanction of these anomalous operations, which are neither wholly warlike nor wholly peaceful. What should be done is to create a strong public opinion against their use on slight provocation, or for a manifestly unjust cause.

The value and  
admissibility of  
these anomalous  
measures.

## § 161.

Writers on International Law are divided as to the necessity of Declarations of War. Among the early publicists there was a great preponderance of opinion in favor of requiring them, and some went so far as to say that the enemy should not be attacked till some time after a Declaration had been issued. Modern writers are inclined to hold that formal Declarations of War are not needful, but a few of them still uphold the older doctrine.<sup>1</sup> If we turn to practice we shall find that in the

Declarations of  
War are not  
necessary.

<sup>1</sup> *E.g.* Hautefeuille, *Droits des Nations Neutres*, I., 106.

Middle Ages heralds were generally sent to give the enemy formal warning of the approach of hostilities. It was part of the character of a true knight not to attack his opponent without notice, though sometimes the notice itself was turned into an insult, as when Charles V. of France declared war in 1369 against Edward III. of England by a letter, the bearer of which was only a common servant.<sup>1</sup> The practice decayed with the decay of feudal ideas; but heralds were occasionally used as messengers of war long after chivalry was forgotten, the date of the last instance being 1657, when Sweden sent a herald to Copenhagen to declare war against Denmark. Declarations handed in by diplomatic agents took the place of formal notices and challenges sent by heralds, but the use of them was by no means universal. In 1588 Philip II. of Spain sent the Armada against England without any Declaration of War, and Gustavus Adolphus did not issue one when he attacked the German Empire in 1630. Moreover Declarations were frequently issued after the war had gone on for some time, as was the case in 1665 when the English declared war against the Dutch, though all through 1664 the two nations had been fighting in Africa and the West Indies and along the coast of North America. Delay in the issue of the formal Declaration often happened when the war broke out in distant dependencies, or when one of the parties commenced as an accessory, by giving limited assistance to a friend, and afterwards became a principal. In such cases as these the treaty of peace sometimes stipulated that all prizes made before the Declaration of War should be restored. The nearer we approach to modern times the rarer do formal Declarations become. There have been only eleven of them between civilized states since 1700, whereas the present century has seen over sixty wars or acts of reprisal begun without formal notice to the power attacked.<sup>2</sup> But the last two great

<sup>1</sup> Ward, *History of the Law of Nations*, II., 208.

<sup>2</sup> Maurice, *Hostilities without Declaration of War*.

European wars witnessed a return to the older practice. In 1870 a formal Declaration of War from the French Chargé d'Affaires at Berlin preceded the outbreak of hostilities and partook of the nature of a warning to Prussia ;<sup>1</sup> and in 1877 a despatch declaring war was handed to the Turkish representative at St. Petersburg. In the latter half of the last century it became the custom for a belligerent state to publish a Manifesto in its own territory at the outbreak of war. Copies of it were sent to neutral sovereigns, and it was regarded as the official justification of the war. But though such a document has often been issued when no Declaration was made, there have been plenty of instances where war was commenced without official warning of any kind. In 1812 the United States began war with England by seizing all British vessels in their harbors and invading Canada ; and in 1854 the British fleet entered the Black Sea with orders to compel the Russian squadron to return to Sebastopol, before the ambassadors had been withdrawn on either side.<sup>2</sup>

It is clear from these facts that no Declaration or Manifesto of any kind is necessary in order to legalize a war ; nor does morality demand that the publication of some formal document shall be made obligatory. Unless the attacking state acts with the grossest perfidy the state attacked must always be warned. Some demands must have been made upon it, some reason for hostility indicated. It is very seldom that a ruler behaves as did Frederick the Great in 1740, when his troops crossed the border into the province of Silesia two days before his ambassador arrived at Vienna to demand its surrender to Prussia.<sup>3</sup> Generally there is a period of negotiation followed by an *ultimatum*, that is a demand the refusal of which will be followed by war. A careful state can hardly be taken by surprise, especially as the ease of communication in modern times

<sup>1</sup> Maurice, *Hostilities without Declaration of War*, p. 76.

<sup>2</sup> *Ibid.*, pp. 44, 45, 66.

<sup>3</sup> *Ibid.*, pp. 16, 17.

renders the concealment of any unusual concentration of forces almost an impossibility. Moreover the legal effects of war can always be dated from the first act of hostility, and in fact are so dated except in the few cases where the struggle is inaugurated by a formal declaration.

### § 162.

Every independent state decides for itself whether it shall make war or remain at peace. If it resorts to hostilities it obtains as a matter of course all the rights of a belligerent. Other states have no power to give or to withhold them. But the case is very different with regard to those communities which are not already states in the eye of International Law, though they are striving to become independent, and to have their independence recognized by other powers.<sup>1</sup> Technically they form portions of old-established states. Practically each is in revolt against the state organization to which it belongs in law, and is endeavoring to set up a separate state organization for itself or to gain control of the existing organization. By the Municipal Law of the country of which the community is still legally a part its members are traitors and liable to punishment as such. Yet they are carrying on open war under the orders of authorities analogous to those of recognized states. How then are they to be treated? International Law gives no answer to this question as far as the government against which they are in revolt is concerned. Questions between it and its rebels are domestic questions to be resolved by internal authority. In modern times when civil strife reaches the dimensions of a war the parent state invariably treats the insurgents as belligerents, partly from motives of humanity and partly because it does not care to expose its own forces to military reprisals. An instance of this on a large scale is afforded

The meaning  
and effects of  
Recognition of  
Belligerency.

<sup>1</sup> See § 59.

by the events of the American Civil War. The Supreme Court decided in the case of the *Amy Warwick*<sup>1</sup> that the Confederates were at the same time belligerents and traitors, and subject to the liabilities of both. In practice, however, they were treated as belligerents throughout the struggle. But if third parties are affected by the war, International Law steps in and gives them rules by which to govern their conduct towards the combatants. It lays down that they may under certain circumstances grant to the side in arms against the parent state all the rights of lawful belligerents. The notice of their intention to do this is called Recognition of Belligerency. It must be publicly given either in words, or by the performance of acts peculiar to the relation between a neutral and a belligerent community. It does not confer upon the community recognized all the rights of an independent state; but it grants to its government and subjects the rights and imposes upon them the obligations of an independent state in all matters relating to the war. It follows from this that the powers which give such recognition are bound to submit to lawful captures of their merchantmen made by the cruisers of the community recognized or by those of the mother country. They must also respect effective blockades carried on by either side, and treat the officers and soldiers of the rebels as lawful combatants, no less than the officers and soldiers of the established government.

### § 163.

Since Recognition of Belligerency has such important legal effects, it is necessary to discuss the circumstances under which it may be given by third powers without offence to the parent state. Two conditions are necessary. The struggle must have attained the dimensions of a war, as wars are understood by civilized states, and the interests of the power which recog-

The circumstances under which Recognition of Belligerency may be lawfully given.

<sup>1</sup> Black, *Reports of the U. S. Supreme Court*, II., 635.

nizes must be affected by it. The first condition is satisfied when the revolted community is seated upon a definite territory, over which an organized government exercises control except in so far as parts of it may be in the military occupation, of the enemy, in which forces are levied and organized, and from which they are sent into the field to combat according to the rules of civilized warfare. The second condition is satisfied when there are so many points of contact between the subjects of the recognizing state and the warlike operations, that it is necessary for it to determine how it will treat the parties to the struggle. When an insurrection is confined to a district in the interior of a country, other states would be acting in an unfriendly manner if they recognized the belligerency of the insurgents, because by the nature of the case the incidents of the conflict could not directly affect their subjects. But if a frontier province rebelled, it would be difficult for the neighboring power or powers not to determine whether or no the rebellion amounted to a war; and should the struggle be maritime, states interested in sea-borne commerce could hardly refrain from recognition, if the area of hostilities was wide and the interests at stake great and various. The *status* of cruisers, the legality of blockades, and the validity of captures must be determined. What is lawful treatment of neutral merchantmen, if there is a war, is unauthorized and illegal violence, if there is not; and inasmuch as Recognition of Belligerency relieves the parent state from responsibility for the acts of the insurgent cruisers, and allows it to use the ordinary measures of naval warfare towards the vessels of the recognizing power, it is almost as much benefited by the act as are the people in revolt against it. All these points were thoroughly discussed in the controversy which arose between Great Britain and the United States with regard to the recognition by the former of the belligerency of the Southern Confederacy in the spring of 1861; and it is generally admitted now that the conduct of the British Government was perfectly lawful

and the recognition neither uncalled for nor premature, seeing that great commercial interests were involved and President Lincoln had proclaimed a blockade of the Southern ports three weeks before the Queen's proclamation was issued.<sup>1</sup>

### § 164.

Recent events in some of the South American Republics have come very near to raising the question whether a revolted fleet can receive Recognition of Belligerency, if the party in whose interests it is acting has gained possession of no place or province to be the land basis of its operations. When the Chilian congressional party revolted against President Balmaceda in 1891, it had at first only the fleet on its side ; but in a very short time districts and land forces joined the movement, which was then recognized by neutral powers and succeeded in gaining control of the government after a severe struggle. In the case of the Brazilian insurrection in 1893, the fleet under Admirals de Mello and da Gama was the chief agent of the revolt ; but it seems to be an undoubted fact that certain provinces or parts of provinces rose against the established government, and it is claimed that the insurrectionary movement originated on land. Recognition of Belligerency was not accorded to the insurgents. Whether it could ever be lawfully given in the absence of any land basis for the operations of a revolt is a question which third states have not been obliged to solve, though circumstances have so nearly presented it to them that a good deal of attention has been directed towards it. On the one side it may be argued that all the activities of a state or quasi-state are so intimately connected with the notion of territorial sovereignty, that it would be impossible to give even the limited rights of a belligerent to a community which had political control over no portion of the earth's

The question whether Recognition of Belligerency can be given to a fleet acting without a land basis.

<sup>1</sup> Wharton, *International Law of the United States*, § 69.

surface. On the other side it may be said that the warlike operations of an insurgent fleet would so affect the interests of neutral commerce, that maritime powers would be obliged to regard them as lawful acts of warfare, unless they were prepared to take the extreme step of treating the revolted vessels as pirates, or the less extreme but still high-handed course of restraining the insurgents from performing certain acts affecting neutral interests. This was done in 1893 and 1894, when the revolted squadron in the harbor of Rio was prevented by the war vessels of the United States, Great Britain and other powers from enforcing a blockade of the port against their respective merchantmen. If the case should actually arise, events, and not legal reasoning, will probably settle it, as the Brazilian difficulty has been settled, by the collapse of the insurrectionary movement, and the surrender of most of the insurgent ships on March 13, 1894. A fleet without a port or land basis of any kind cannot continue hostilities for long. Unless some portion of the state's territory joins it, the operations it carries on will soon come to an end, and third powers can afford to await the inevitable conclusion.<sup>1</sup>

### § 165.

The outbreak of the war brings about an immediate and important change in the legal relations of the subjects of the belligerent states. The public armed forces on each side are at once endowed with the right to carry on active hostilities according to the ordinary rules of warfare; and private individuals come under an obligation to refrain from holding pacific intercourse with the enemy. It is treasonable for them to give him intelligence about the plans and operations of their own side. They may not buy public funds and securities created by his government during the war. As soon as war begins existing commercial partnerships between them and enemy subjects are *ipso facto* dissolved, and no new ones may be

The immediate  
legal effects of the  
outbreak of war.

<sup>1</sup> For a full discussion of this question see Lawrence's "Recognition of Belligerency considered in Reference to Naval Warfare," in the *Journal of the Royal United Service Institution* for January, 1897.



entered into till peace is restored. No debts contracted with enemy subjects before the war can be recovered during its continuance, nor can contracts entered into but not performed be enforced ; but as soon as it is over the right to obtain what is due by legal process revives. No insurance of enemy property can be effected or accepted, and no bills of exchange drawn on an enemy subject. In short no business transactions can be carried on, pending hostilities. To the extent, then, of a suspension of all ordinary peaceful intercourse the subjects of enemy states are enemies. This doctrine is denied by some continental publicists, but with little reason. Non-combatants are exempt from any of the severities of warfare, yet they are not by any means free to act as if no war existed.

The rules we have laid down are those of the Common Law of nations, which, however, allows exceptions to some of them in the case of what are called contracts of necessity. Ransom bills may be given by captains of captured merchantmen to their captors, if the law of their own country allows it ;<sup>1</sup> and bills of exchange may be drawn by a prisoner in the enemy's country to obtain means of subsistence. Another and wider class of exceptions is due to the policy of the belligerents, who sometimes relax the strict rules of non-intercourse in favor of special individuals, by granting them licenses to trade with the enemy at a specified place in specified articles and to a specified extent. A belligerent may give licenses to neutrals as well as to his own subjects. Sometimes trade with the enemy is allowed on a larger scale by a wide and general permission, addressed not to particular individuals but to all whom it may concern. Thus at the beginning of the Crimean War in 1854 trade with non-blockaded Russian ports was allowed to British subjects, provided that it was carried on in neutral vessels and did not include articles that were contraband of war. The French Government gave a similar permission to its subjects,

<sup>1</sup> See § 208.

and Russia allowed English or French goods, the property of English or French citizens, to be imported into her dominions in neutral vessels.<sup>1</sup> It is by no means impossible that commercial interests will secure similar relaxations of the strict rules of warfare in future struggles between great trading nations.

### § 166.

We are faced by a number of difficult and complicated questions when we come to consider the effect of war upon treaties to which the belligerents are parties. The only way in which it is possible to deal with them satisfactorily is to adopt the method of analysis. We will begin by separating treaties to which other powers beside the belligerents are parties from treaties to which the belligerents only are parties. The former class will at once divide into Great International Treaties and Ordinary Treaties. The former either make epochs in the development of the state system and territorial distribution of Europe, or take a wider range and deal with questions which affect the condition of a large part of the human race, while the latter deal with such matters as commercial and postal intercourse and the every-day business of the society of nations.

In estimating the effect of war upon Great International Treaties we must distinguish three cases. The first arises when the cause of the war is quite unconnected with the treaty. Thus in 1866 Prussia and Austria, two signatory powers of the great Treaty of Paris of 1856 which for a time settled the Eastern Question, were the chief belligerents in a conflict which arose out of German affairs and had no connection with the Turkish Empire and its dependencies. The Treaty of Paris was entirely untouched by that war, and the rights and obligations of Austria and Prussia under it remained what they were before. Under such circumstances

<sup>1</sup> Halleck, *International Law* (Baker's ed.), II., 156, note.

a Great International Treaty is unaffected by the war. The next case occurs when the war does not arise out of the treaty, but operates to hinder the performance of some of its stipulations by the belligerents. France, for instance, when in 1870 she was reeling under the blows of Germany, would not have been able to make good the guarantee of the independence and integrity of the Ottoman Empire into which she had entered with England and Austria in 1856. In such a condition of affairs the obligations it is impossible to fulfil must be held to be suspended for a time and to revive again when the power in question is able to undertake them. The remaining provisions of the treaty, which require merely passive acquiescence and not active support, continue to bind the crippled state, and the whole treaty remains binding on the other signatory powers. The third case occurs when the war arises out of the treaty. This happened in 1877, when Russia and Turkey, two of the parties to the Treaty of Paris of 1856, went to war upon the Eastern Question. It is very difficult to say what are the legal effects of such action. The chief factor in determining them must be the will of the other signatory powers. In 1877-1878 they remained neutral during the war, but at its close put in a successful claim to be consulted in drawing up the conditions of peace, on the ground that, having allowed the state of affairs established in 1856 to be upset by the war, they were entitled to a voice in shaping the new arrangements which were to take its place. If they had chosen instead to adopt the course of insisting upon the Treaty of Paris and making war against any power that infringed it, they would no doubt have been within their technical right. Or, if the disagreement between the belligerents had related to a small and unimportant point in the treaty, they might have been allowed to settle their quarrel without interference, on the understanding that the other stipulations remained in force unaffected by the war.

Ordinary Treaties to which one or more powers besides the

belligerents are parties, are affected by the war according to their subject-matter. Thus an alliance between three states would be destroyed altogether if war broke out between two of them ; a Treaty of Commerce would cease to operate between the belligerents, but would remain in force between each of them and the other states who were parties to it ; and a Convention with regard to maritime capture would come into operation between the belligerents, and between each of them and the neutral signatory powers.

### § 167.

We have now to deal with treaties to which the belligerents only are parties. Considered with reference to the effect of war upon them, they fall into four classes. In the first we may put those to which the name *Pacta Transitoria* has been given. They are agreements fulfilled by one act or series of acts, which produce by being once performed a permanent effect. Boundary Conventions and Treaties of Cession or Recognition are examples. War has no effect upon them. They remain unchanged in spite of it. For example, the boundaries between belligerent states may be readjusted in consequence of the war ; but till the readjustment is effected by the treaty of peace or by completed conquest, the old territorial distribution remains legally in force. The next class is made up of Treaties of Alliance and conventions binding generally to friendship and amity. It is clear that they are entirely destroyed by the war. In the third class we may place conventions for regulating ordinary social, political, and commercial intercourse, such as Treaties of Commerce and Extradition Treaties. The effect of war upon instruments of this kind is very doubtful. They are, of course, suspended while the war lasts ; but it is a much-disputed question whether they revive again at the conclusion of peace, or are destroyed by the war and require to be

The effect of war upon treaties to which the belligerents only are parties.

re-enacted if they are to come into force again when it is over. The practice of states exhibits a lamentable absence of uniformity. Some treaties of peace expressly stipulate for the revival of postal and commercial agreements subsisting before the war, the inference being that the stipulation was necessary to give force to the revived arrangements. Other treaties contain no covenant for revival, and yet under such circumstances agreements of the kind we are considering have been acted upon after the peace on the understanding that they were restored to efficiency by it. In judicial decisions we find a nearer approach to a fixed rule. The Supreme Court of the United States laid down in the case of the *Society for the Propagation of the Gospel v. the Town of New Haven*<sup>1</sup> that the stipulations regarding confiscations and alienage in the Treaties of 1783 and 1794 between the United States and Great Britain were of a permanent character, and were not, therefore, abrogated by the War of 1812, though their enforcement was suspended while it lasted. And in England in 1830 the Master of the Rolls decided in the case of *Sutton v. Sutton*<sup>2</sup> in favor of the permanency of the Treaty of 1794 which gave to citizens of each country and their heirs and assigns the right to hold land in the other. With these facts before us we may venture to say that, though no rule can be laid down as undoubted law, it is best to hold on general principles that treaties of the kind we are now considering are merely suspended by war and revive at the conclusion of peace. The fourth and last class contains treaties which regulate the conduct of the contracting parties towards each other when they are belligerents, or when one is a belligerent and the other is neutral. Cases in point are afforded by the numerous agreements giving to the subjects of each of the contracting powers the right to remain in the territory of the other should the two countries be at war, and by stipulations for the regulation of

<sup>1</sup> Wheaton, *Reports of U. S. Supreme Court*, VIII., 494.

<sup>2</sup> Russell and Mylne, *Chancery Reports*, I., 663.

maritime capture. The effect of war upon all treaties of this class is to bring them into active operation.

What we have said above applies not only to whole treaties, but also to separate stipulations in treaties dealing with several subjects. With the aid of the table printed on the next page it is hoped that the careful reader will be able to see his way through this intricate subject. The sweeping statements to be found in diplomatic correspondence concerning the effect of war on treaties may be passed over with little respect.<sup>1</sup> They are invariably made in support of a foregone conclusion. The method of observation, analysis and classification is the only one capable of yielding fruitful results.

<sup>1</sup> Wharton, *International Law of the United States*, § 135.

## § 168.

TABLE SHOWING THE EFFECT OF WAR ON TREATIES TO WHICH THE BELLIGERENTS ARE PARTIES.

I. Treaties to which other powers beside the belligerents are parties.	(A) Great International Treaties.	(a) When the war is quite unconnected with the treaty.	Unaffected.
		(b) When the war does not arise out of the treaty, but prevents the performance of some of its stipulations by the belligerents.	Unaffected as regards the other stipulations, and entirely unaffected with regard to neutral signatory powers.
		(c) When the war arises out of the treaty.	Effect doubtful, depending chiefly on will of neutral signatory powers.
		(B) Ordinary Treaties to which one or more powers beside the belligerents are parties.	Effect depends upon subject-matter. Generally suspended or abrogated with regard to belligerents; unaffected with regard to third parties.
II. Treaties to which the belligerents only are parties.	(a) Pacta Transitoria.	Unaffected.	
	(b) Treaties of Alliance.	Abrogated.	
	(c) Treaties for regulating ordinary social and commercial intercourse, such as postal and commercial treaties, conventions about property, etc.	Effect doubtful. Generally the treaty of peace deals with such matters; if not, it is best to take the stipulations as merely suspended during war.	
	(d) Treaties regulating the conduct of signatory powers towards each other as belligerents or as belligerent and neutral.	Brought into operation by war.	

## CHAPTER II.

### THE ACQUISITION BY PERSONS AND PROPERTY OF ENEMY CHARACTER.

#### § 169.

ENEMY character is a quality possessed in a greater or less measure by persons and things. It is by no means constant; but may be likened to a taint which in some cases is powerful, in others weak, and may be of any degree of strength between the two extremes. Some persons are enemies in the fullest sense of the word; that is to say they may be killed by the public armed forces of the state. Others are enemies only in the sense that a certain limited portion of their property may be subjected to the severities of warfare. And it is the same with things. Sometimes they are enemy property in the sense that they may be captured wherever it is lawful to carry on hostilities: sometimes they may be taken only under very special circumstances. We will endeavor to arrange both enemy persons and enemy property in an ascending and descending scale, according to the degree in which the hostile character is impressed upon them.

Enemy character,  
and the extent to  
which individuals  
possess it.

#### § 170.

First among those individuals who may be regarded as enemies we must place

*Persons found in the military or naval service of the enemy state.*

These are enemies to the fullest extent. They may be killed or wounded in fair fight according to the laws of war,



and, if captured, may be held as prisoners of war. Their nationality makes no difference in this respect. If any of them are neutral subjects, they can claim no immunities on that account. They are free from special severities, but they are subject to the ordinary risks and incidents of civilized warfare. Enrolment in the public armed forces of a belligerent puts them in the same position as their comrades who are subjects of the state for which they are fighting. Their own state may possibly at some future time punish them for breach of her neutrality regulations in joining a foreign army to fight against a power with which she is at peace ; but the enemy must treat them as lawful combatants. The only exception to this rule occurs when a state finds subjects of its own fighting against it in the ranks of its foes. In such a case it would have the right, should it capture them, to execute them as traitors, instead of treating them as prisoners of war.

Persons enrolled in the enemy's fighting forces are enemies to the fullest extent.

### § 171.

The next class of enemies are

#### *Seamen navigating the merchant vessels of the enemy state.*

These persons differ from ordinary combatants in that they may not attack the enemy on their own initiative, and from ordinary non-combatants in that they may fight to defend their vessel if it is attacked by the enemy. They, therefore, occupy a position between the fighting forces and the civilian population. Should a fight be forced upon them in defence of their vessel from a hostile cruiser, they are thereby placed in the position of combatants, and, if captured, must be held as prisoners of war. But if they attack other vessels they may be subjected to all the severities which International Law decrees against non-combatants who perform hostile acts against the enemy.

Crews of the enemy's merchant vessels are enemies in a lesser degree.

## § 172.

Travelling down the scale we now come to

*Non-combatant subjects of the enemy state.*

But though they must be reckoned as enemies, they do not possess the hostile character to such an extent that they may be slain or made prisoners as long as they live quietly and take no part in the contest. Their property is, however, subject to certain severities, such as capture at sea if found under the enemy flag, and requisitions and contributions on land. The nature and extent of these possibilities will be shown in our discussion of the incidents of warfare on land and sea, where it will further appear that the non-combatant population of invaded districts may be compelled to perform certain personal services for the invader.<sup>1</sup> But most of these dangers and severities are escaped if the non-combatant enemy subject is domiciled in a neutral country. He does not then increase the resources of the enemy by the payment of taxes and the increase of wealth due to his trading operations. Moreover he resides in a place where no warlike operations can be carried on and consequently is free from personal molestation. In so far as his trade and his other proprietary interests are connected with the neutral country, he bears a neutral and not an enemy character ; but if he should possess property in the country of his allegiance, and the enemy should occupy the district in which it was situated, it would be treated by them as enemy property. It was decided in the case of the *Danous*<sup>2</sup> that a British subject, resident in the neutral country of Portugal, in a war between Great Britain and Holland, was not only neutral as regards the property connected with his Portuguese domicile, but was even free to carry on a trade allowed to neutrals between Portugal and Holland.

<sup>1</sup> See § 192.

<sup>2</sup> Robinson, *Admiralty Reports*, IV., 255, nota.

## § 173.

Another class of persons who possess the enemy character in some degree are

*Persons resident in an enemy country, even though they are subjects of the country making war on it or of neutral countries.*

They are enemies to one belligerent in so far as they are identified with the other. That is to say, any property they may possess in connection with their domicil would be accounted enemy property for purposes of maritime capture, and should the district in which they live be occupied they would come under all the disabilities incident to the occupation, just like the civilian population of enemy nationality around them.

Persons other than enemy subjects, resident in the enemy's country, are enemies in so far as their interests are identified with those of their place of residence.

## § 174.

We have next to mention

*Persons living in places in the military occupation of the enemy.*

These a state regards as enemies to the extent of subjecting to hostile capture their property proceeding from the places in question, even though they may be parts of its own territory. Being under enemy occupation, their possession enriches the enemy for the time being and contributes to his warlike resources, while their own country reaps no advantage from them. They are, therefore, liable, while the occupation lasts, to the severities exercised in war against the property of non-combatant subjects of the enemy state. But if the hostile occupants are dispossessed, the inhabitants are, of course, treated as citizens and not as

Residents in places occupied by the forces of the enemy are enemies in so far as their property under enemy control is concerned.

residents in enemy territory. During the Civil War in the United States the courts regarded places in the firm possession of the Southern Confederacy as enemy territory, and the property of persons domiciled therein as enemy property in so far as the rules of warlike capture were concerned.<sup>1</sup>

### § 175.

The last class of persons who possess the enemy character in any appreciable degree are

*Neutral subjects having houses of trade in the enemy's country.*

They are enemies only in the sense that their goods connected with these houses of trade are liable to capture.

Neutral subjects having houses of trade in the enemy's country are enemies to the extent of their interests in the enemy's trade.

But if an enemy merchant has a house of trade in a neutral country, his goods connected with it will be condemned as prize of war. In the first case the character of the place whence the goods issue prevails, in the second case the national character of the owner. In both cases the goods are captured, the severe laws of warfare not having experienced in this connection that modification in the interests of commerce which has recently been so conspicuous in other departments.

### § 176.

We see from the foregoing list of those who are technically enemies, that citizenship and domicile are the two great tests of hostile character, but that other circumstances, such as being temporarily or permanently in the enemy's service, or residing in a district occupied by him, or having a house of trade in his country, are taken into consideration, and are held to taint the individual concerned to a greater or less degree. It should be noted that because a person is

Summary of the circumstances under which the enemy character is acquired by persons.

<sup>1</sup> Wheaton, *International Law* (Dana's ed.), note 160.

technically an enemy and his property, or some of it, enemy property, we are not therefore to assume that it is of necessity liable to hostile seizure. The circumstances under which captures may be made will appear as we set forth the rules of land and sea warfare.

### § 177.

It is clear from the foregoing statements that domicile modifies to a great extent the rules based on nationality. *Primâ facie* all subjects of the enemy state are enemies, and all subjects of neutral states are neutrals; but this principle is qualified by the doctrine that hostile character depends largely upon residence. It is necessary, therefore, to inquire what kind of residence amounts in law to domicile, and how far liability to the severities of war is affected thereby. Fortunately there are in existence a number of decisions on these points by great Prize Court judges both in England and in the United States, and it is easy to gather from them a body of clear and consistent doctrine. Domicil is determined by the intent of the parties and by the length of their residence. If the intent to go to a certain place and live there is perfectly clear, a domicile therein is acquired directly residence commences. If the intent is not clear, long-continued residence will create a domicile; and an intent to make a short stay in a place and then return is held to be overridden by remaining there a long time and treating the place as a home. In every case where a man is a citizen of one country and has his home in another, the liability of his property connected with the latter country to capture and other incidents of warfare is determined by domicile and not by nationality. If the country of his domicile be neutral, he has a neutral character in so far as his property connected with that country is concerned; if it be belligerent, he has a belligerent character which renders his property connected with it enemy property to the other belligerent. But any property

Rules for determining domicile in relation to questions of belligerent capture.

which he may possess in the country of his citizenship and allegiance follows the condition of that country as neutral or belligerent.

The effect of intent in creating a domicile of choice was stated by Lord Camden in his judgment on the case of the non-Dutch subjects who were found by Admiral Rodney in the island of St. Eustatius when the British took it from the Dutch in 1781. With regard to those who meant to remain there, he laid down that "they ought to be considered resident subjects" of the Republic of the United Netherlands; and he applied this rule to the case of Mr. Whitehill, a natural-born British subject, who had arrived in the island only a few hours before the British fleet attacked it, but was shown to have intended to take up his permanent residence therein.<sup>1</sup> In the case of the *Harmony* the influence of time upon domicile was exhaustively considered in a judgment delivered by Lord Stowell. The vessel was an American merchantman which had been brought in for adjudication by a British cruiser in the war between Great Britain and France at the end of the eighteenth century, on the ground that the cargo consisted of enemy goods. The partners of a house of trade in the United States claimed a portion of it as belonging to them, and therefore neutral property. Restitution was decreed with regard to the share of the partners residing in the United States; but in 1800 Lord Stowell decided against another partner, Mr. G. W. Murray, on the ground that he was residing in France, the country of the enemy. Murray had travelled from the United States to France to look after the business of the firm in that country; but he had remained in France for four years together, and, though it was clear he intended to return to America where he had a wife and child, there was also evidence to show that he purposed to come back again to Europe. Upon these facts Lord Stowell laid down that "a special purpose may lead a man to a country where it shall detain him the whole of his

<sup>1</sup> Wheaton, *International Law*, § 321.

life. Against such a long residence the plea of an original special purpose could not be avowed." He continued, "Supposing a man comes into a belligerent country at or before the beginning of the war, it is certainly reasonable not to bind him too soon to an acquired character, and to allow him a fair time to disentangle himself; but if he continues to reside during a good part of the war, contributing by the payment of taxes and other means to the strength of the country, he could not plead his special purpose with any effect against the rights of hostility." <sup>1</sup> These cases clearly show that time and intent are the two great elements in determining domicile.

In cases of acquired domicile original character easily reverts. In order that it may do so nothing more is necessary than that the person domiciled abroad should start on his return journey to his native country, intending to take up his abode there. Thus in 1800, in the case of the *Indian Chief*, Lord Stowell restored the property of Mr. Johnson, a citizen of the United States domiciled in England. It had been captured because it was engaged in a traffic prohibited to British subjects but allowed to neutral American citizens. But on proof that at the time of capture Mr. Johnson had left England on his way to the United States with the intention of remaining there, Lord Stowell decided that he had lost his domicile of choice and regained his domicile of origin. "The character," said the judge, "that is gained by residence ceases by non-residence. It is an adventitious character, and no longer adheres to him from the moment that he puts himself in motion *bonâ fide* to quit the country *sine animo revertendi*." <sup>2</sup>

These principles of the British Prize Tribunals were deliberately adopted by the Supreme Court of the United States in the case of the *Venus*,<sup>3</sup> which arose during the war

<sup>1</sup> Robinson, *Admiralty Reports*, II., 324, 325.

<sup>2</sup> *Ibid.*, III., 20, 21.

<sup>3</sup> Cranch, *Reports of U. S. Supreme Court*, VIII., 253-317.

of 1812-1814 between the two countries. They are indeed the common property of all civilized states, and part and parcel of the undoubted law of nations. It must, however, be noted that the national character of Western merchants trading in Oriental countries still under native rule is determined neither by citizenship nor by residence, but by the nationality of the Consulate under whose protection they live and on whose register their names are inscribed.

### § 178.

We have now to consider how the enemy character is acquired by property. To some extent we have already dealt with this subject incidentally while discussing enemy persons; but we shall find that it is susceptible of separate treatment, and that a classification can be made of the various kinds of property marked by the hostile taint. Certain characteristics make property into enemy property, and as long as it possesses them it will be subject to capture, if the circumstances of locality and use give a belligerent the right to take it.

Enemy character and the extent to which property possesses it.

### § 179.

Enemy property comprises first

*Property belonging to the enemy state.*

Such things as the public armed vessels of the enemy, his guns and munitions of war, are of a pre-eminently hostile character, and may be taken in all places where it is lawful to carry on warlike operations; but, as we shall see in future,<sup>1</sup> there are other kinds of property belonging to the enemy state which are wholly or partially exempt from confiscation.

The property of the enemy state possesses the enemy character fully.

<sup>1</sup> See §§ 202, 205.



## § 180.

Under the head of enemy property

*Property belonging to subjects of the enemy state*

is naturally included, unless it is connected with a neutral domicile acquired by its owner. In that case it is accounted neutral and remains free from hostile seizure.

Since property belonging to an enemy is *primâ facie* enemy property, and property belonging to a neutral *primâ facie* neutral property, enemy property-owners often endeavor at the outbreak of war to transfer their vessels to neutrals in order that the neutral flag may protect them from capture, and sometimes these transfers are merely colorable. The Prize Courts of France do not recognize sales of merchant vessels by enemy subjects to neutral subjects during war. The English and American courts do not go so far as to forbid them absolutely, but they scrutinize every transfer very rigidly in order to be sure of the good faith of the transaction. Transfers of belligerent vessels and goods to neutrals effected *in transitu*, that is to say while the voyage is going on, are prohibited altogether, not only during hostilities, but even when made in contemplation of war. The general rule of maritime law in time of peace is that goods once laded on board a vessel belong to the consignee. Yet special agreement is allowed to alter the position of the parties and render the goods the property of the consignor till the termination of the voyage. But in war, if the consignee is an enemy, no special agreement can divest him of his proprietary rights in the goods from the moment they start on their voyage. If, however, he is neutral, proof is required that he, and not the enemy consignor, is really owner, the Prize Courts in each case leaning towards that legal doctrine which makes the goods enemy property and renders them liable to capture.

The property of enemy subjects possesses the enemy character unless it is connected with a neutral domicile.

## § 181.

The next kind of enemy property to be considered may be defined as

*The produce of estates owned by neutrals in belligerent territory or in places in the military occupation of the enemy, as long as it remains the property of the owner of the soil.*

Such property is enemy property, even though the neutral owners reside in their own neutral country. The point was fully discussed and decided by the Supreme Court of the United States in the case of the *Thirty Hogsheads of Sugar*, which occurred in the war of 1812-1814. An American privateer captured a cargo of sugar proceeding in a British vessel from the Danish island of Santa Cruz to a commercial house in London at the risk of its owner, the proprietor of the estate from whence it came. Denmark was an ally of France, and Great Britain was at one and the same time engaged in waging war on them and carrying on a separate war on different grounds with the United States. In the course of her war with Denmark she had captured the island of Santa Cruz and held it under her belligerent occupation. Denmark was neutral in the war between Great Britain and the United States; and the proprietor of the sugar, Adrian Benjamin Bentzon, was a Danish subject who had left Santa Cruz and was living in Denmark. But the Supreme Court condemned the sugar on the ground that it was the produce of a place which must be considered for purposes of war as belligerent territory, and was when captured the property of the owner of that place.<sup>1</sup>

The produce of estates owned by neutrals in places under enemy control is enemy property as long as it belongs to the owner of the soil.

<sup>1</sup> Cranch, *Reports of U. S. Supreme Court*, IX., 195-199.

## § 182.

The last kind of property which possesses the enemy character is

*Property owned by neutrals, but incorporated in enemy commerce or subject to enemy control.*

A ship with an enemy captain and crew employed in the trade of the enemy would be treated as enemy property, even though she belonged to a neutral owner, and the same fate would probably befall a neutral ship habitually sailing under the enemy's flag or taking a pass or license from the enemy. There can be no doubt that neutral goods laden on board a public armed vessel of the enemy forfeit their neutral character and become liable to capture as enemy property. But if they are laden on board an armed enemy merchantman their position is not clearly defined. In 1815 Lord Stowell decided in the case of the *Fanny* that the fact of being found on board an enemy vessel armed to resist attack was conclusive against the goods.<sup>1</sup> But in the same year the Supreme Court of the United States took the contrary view in the case of the *Nereide*, and held that unless the neutral owner took part in the armament or the resistance his goods were not liable to forfeiture.<sup>2</sup> Judge Story, however, supported the English view and delivered an elaborate dissenting judgment. It appears, therefore, that there is a slight balance of authority in favor of the stricter rule, which seems on principle to be the better of the two, for it is difficult to see what other object the neutral owner could have had in view, when he selected an armed enemy merchantman as the vehicle for his goods, than to profit by her force in order to defeat the search and capture of the other belligerent.

Neutral property incorporated in enemy commerce or subject to enemy control possesses the enemy character as long as it remains in its equivocal position.

<sup>1</sup> Dodson, *Admiralty Reports*, I., 443-449.

<sup>2</sup> Cranch, *Reports of U. S. Supreme Court*, 388-455.

## § 183.

We are now in a position to answer the question, How does property acquire the enemy character? Its legal condition is determined sometimes by the nation-

Summary of the circumstances under which the enemy character is acquired by property.

ality of the owner and sometimes by his domicile, sometimes by the character of the place from which the property comes and sometimes by the nature of the control exercised over it. There remains, however, a difficulty connected with the double or ambiguous character of sovereignty in certain cases. Fortunately these cases tend to decrease in number with the simplification of the political condition of modern Europe, though it may well be doubted whether recent assumptions of Protectorates in Africa will not add to them in the future. They occur when two or more powers can each claim authority over certain territory. If one of them be belligerent and the other neutral, it is difficult to tell how the territory is to be regarded for war purposes. The Protectorate exercised by Great Britain over the Ionian Islands gave rise to such a difficulty during the early part of the Crimean War, when the *Leucade*, an Ionian vessel, was captured by a British cruiser and brought in for adjudication before a Prize Court on a charge of trading with Russia, the enemy of Great Britain in the war. It was contended that, since the Ionian Islands were under a British Protectorate, they were parties to the war and their vessels were forbidden to engage in commerce with the enemy. But Dr. Lushington, who tried the case, held that the Ionian Republic was not a party to the war. It had a commercial flag of its own, and, though Great Britain occupied its fortresses and had control of its diplomatic arrangements, it was not involved in the public acts of the British Government unless specially included. There had been no special inclusion in the case of the then existing war. British vessels had been forbidden to trade with Russia, but Ionian vessels had not. He, there-

fore, restored the vessel, but would not give costs against the captors on the ground that the point was a very difficult one and they acted in perfect good faith.<sup>1</sup> The cession of the Ionian Islands to Greece in 1864 has rendered a repetition of the case impossible, but we may venture to point out with regard to it that the judgment seemed to leave the determination of the *status* of the island Republic exclusively in the hands of one of the belligerents. It is possible to imagine circumstances in which this would have operated unfairly towards the other. If, for instance, Great Britain had used the islands as a depôt and base of naval operations and at the same time claimed immunity for their commerce as being neutral, Russia would have had good cause to complain. In discussing cases of double or ambiguous sovereignty, Hall lays down the rule that the use to which a place is put by the power which exercises *de facto* control over it determines whether it should be regarded as neutral or belligerent territory.<sup>2</sup> This test is at once simple, effective, and fair as between the hostile powers; and we may hope that it will be adopted in all future cases.

<sup>1</sup> Spinks, *Admiralty Reports*, II., 212.

<sup>2</sup> Hall, *International Law*, § 174.

## CHAPTER III.

### THE LAWS OF WAR WITH REGARD TO ENEMY PERSONS.

#### § 184.

It will be convenient to begin by considering the case of enemy subjects found in a state at the outbreak of war.

The treatment accorded to enemy subjects found in a state at the outbreak of war.

The treatment of such persons has varied very much at different times. In the Middle Ages a right to detain them as captives was held to exist, and, though enemy merchants were generally allowed time to depart, the power to arrest did not become obsolete from disuse. Accordingly the early publicists were obliged to lay down that it existed, though they strove to mitigate its severity. Grotius declared that enemies found within a territory at the outbreak of war might be captured and held as prisoners while the war lasted, but he added that they might not be detained after the termination of hostilities, as in his day ordinary prisoners were.<sup>1</sup> But as commerce grew more powerful arrest was less frequent, till in the middle of the eighteenth century the right to resort to it was denied by Vattel;<sup>2</sup> and from that day to the present a number of treaties have been negotiated, giving a time varying from six months to a year for withdrawal. Such stipulations are hardly needed now; for the old right of arrest has been destroyed by the continuous contrary custom of nearly a hundred and fifty years. The only case of

<sup>1</sup> *De Jure Belli ac Pacis*, III., IX., iv.

<sup>2</sup> *Droit des Gens*, III., § 63.

detention to be found in modern times occurred in 1803, when Napoleon arrested the British subjects found in France after the rupture of the Treaty of Amiens; but this has always been regarded as a violent proceeding carried out in defiance of right. The modern doctrine is that expulsion may be resorted to in extreme cases, but unless there are special reasons to the contrary enemy subjects should be allowed to remain in the country as long as they give no aid or information to their own side. Great Britain inaugurated this liberal policy. In 1756 at the outbreak of war with France she gave permission for French subjects "who shall demean themselves dutifully" to remain in the country; and her Treaty of 1794 with the United States was the first to provide that in future wars between the contracting parties subjects of each residing in the country of the other should remain unmolested as long as they lived peaceably and observed the laws, and should be granted a term of twelve months to wind up their affairs and leave, if their conduct caused them to be suspected.<sup>1</sup> Other states have followed this example, and treaties containing similar provisions are constantly being concluded. The last instance of expulsion occurred in 1870 when the French Government ordered all German subjects to leave the department of the Seine at the time when the German armies were moving on Paris and the population was intensely excited against all who were suspected of belonging to the enemy nationality. The authorities felt doubtful of their ability to protect such persons, and therefore adopted the extreme measure of compelling them to depart. It is difficult to see how they could have acted otherwise under the circumstances of the time, when domestic revolution and foreign invasion were stirring the passions of the people to the lowest depths. But in ordinary wars there is no excuse for a general measure of expulsion directed against all enemy subjects, no matter

<sup>1</sup> Vattel, *Droit des Gens*, III., § 63; *Treaties of the United States*, 392, 393.

how quiet and peaceable they may be. The modern rule, in the absence of treaty stipulations, is that the right to arrest no longer exists, and, though the right to expel remains, it should be used sparingly and only in great emergencies.

### § 185.

The old idea of war was that it wrought an absolute interruption of all relations between the belligerents except those arising from force, and delivered over the enemy and all that he possessed to unlimited violence. Even so humane a man as Grotius, writing at a period so late in the world's history as 1625, was obliged to declare that by the law of nations it was lawful to put to death all persons found within the enemy's territory, including women and children and such resident strangers as did not depart within a reasonable time.<sup>1</sup> But he is careful to add that these extreme severities are allowed only in the sense that they are not forbidden by the customs of nations. He pleads earnestly for better practices, arguing that justice requires a belligerent to spare those who have done no wrong to him, and even when justice does not demand the exercise of mercy, it is approved by goodness, moderation, and magnanimity. He excepts by name from liability to slaughter women, children, old men, priests, husbandmen, merchants and prisoners.<sup>2</sup> But these *temperamenta belli* are recommended by him as counsels of perfection, rather than laid down as actual law. They were eagerly seized upon by the more humane of his successors, and gradually developed into a broad distinction between combatants and non-combatants. From the Peace of Westphalia in 1648 an improvement in the usages of warfare set in, and as they became less severe publicists discarded the old doctrine that war authorized the citizens and subjects of each of the belligerent states to exercise unlimited violence

Ancient and modern ideas of the violence permissible in war.

<sup>1</sup> *De Jure Belli ac Pacis*, III., IV., vi-xiv.

<sup>2</sup> *Ibid.*, III., XI., ix-xiii.



against its foes, and substituted for it the theory that only so much stress may be put upon an enemy as is sufficient to destroy his power of resistance. War is in its nature harsh and cruel. As long as it exists at all it must involve hard blows and terrible suffering. But all possible mitigations and restraints are contained within the principle we have just enunciated and can easily be deduced from it. It limits not only the classes to whom violence may be applied, but also the measure and extent of the violence when applied. Non-combatants do not contribute to the strength of an enemy except by paying taxes and affording supplies. This can be prevented without subjecting them to personal attack or plunder, by the process of occupying the district where they live. Hence it follows that they may not be destroyed. Force is necessary to overcome the resistance of the enemy's fighting men. When that end is attained further infliction of pain is useless. Hence it follows that the wounded must be spared and those who surrender must be received as prisoners.

Several military states have recently issued instructions to their armies in the form of Manuals containing a complete code of rules for use in warfare. The first of these was set forth by the United States in 1863, and the example has been followed by Germany, France, Russia and England. An attempt was made by the Emperor Alexander II. of Russia to bring about the adoption of a common code by the civilized states of the world. At his instigation a conference of representatives of all the powers of Europe met at Brussels in 1874 to discuss the laws of warfare on land. The delegates were not plenipotentiaries, and any agreement they might come to was to be subject to further negotiations between the governments concerned. After long discussion they were able to give their approval to a series of articles which would have formed an excellent basis for a code, though several difficult points were passed over or evaded.<sup>1</sup>

<sup>1</sup> British State Papers, *Miscellaneous*, No. 1 (1875), pp. 320-324.

But Great Britain declined to enter into further negotiations on the ground of the impossibility of any reconciliation of the differences of opinion revealed at the previous conferences. Nevertheless the proposals agreed to at Brussels in 1874 have had a great influence on the Manuals subsequently issued by European states for the guidance of their armies, and on the Code adopted by the *Institut de Droit International* in 1880.<sup>1</sup> We shall refer to them often in the course of this chapter and those which follow; but it must be noted that they have no other authority than that which is derived from the agreement of a number of highly trained experts. Except in so far as they formulate general usage they are not International Law. A short review of the present usages of warfare, with regard first to combatants and afterwards to non-combatants, will show how far mitigations of its old severity have been carried, and indicate what further improvements may be hoped for in consequence of the operation of the principle we have been considering.

### § 186.

In dealing with combatants we will commence with the assertion that

*Quarter is given except in very extreme cases.*

When an armed enemy ceases to fight and begs for mercy, he is said to ask for quarter; and when his life is spared and he is made prisoner, quarter is said to have been granted to him. Not till the beginning of the seventeenth century was it deemed obligatory upon victorious soldiers to give quarter to vanquished enemies; and for some time longer the rule in favor of it was frequently disregarded. When Gustavus Adolphus landed in Pomerania in 1630 he had to make a special agreement with the Imperialists in order to secure

The growth of the practice of giving quarter.

<sup>1</sup> *Tableau Général de l'Institut de Droit International*, 173-190.

that quarter should be granted, and was obliged to consent to the exception of Pomeranians on his own side and Croats on the side of his foes. In the English Civil War between King and Parliament, quarter was refused by the latter to the Irish, though in other respects the struggle was carried on in a more humane manner than was usual in those times. The practice of sparing the life of a foe who asked for mercy became thoroughly established in subsequent wars, and was so completely incorporated in the code of military honor that when in 1794 the French Convention decreed that English soldiers were not to be admitted to quarter, its troops ignored the order and took prisoners on the pretext that they were deserters. According to modern rules quarter can be refused only in retaliation for some enormity committed by the enemy; but even under such circumstances it is better to grant it, and to find some less cruel way of punishing the offender.

### § 187.

The next point is concerned with the treatment of those who have given themselves up and received quarter. We may briefly summarize the best practice with regard to them in the words,

*Prisoners of war are cared for and exchanged.*

It was the custom of early times to kill them, and sometimes to eat them also. Even now there are tribes in existence who first torture and then feast upon captured enemies. Slavery was regarded The treatment of prisoners of war. as a mitigation of their lot; and was justified by Roman Law on the ground that it was a merciful relaxation of the strict rules of warfare which gave the victor a right to the life of his captives.<sup>1</sup> The reduction of prisoners to slavery was practised long after the custom of slaughtering them had been abandoned. In comparatively modern

<sup>1</sup> Justinian, *Institutes*, I., iii., 3.

times we find them, not indeed sold into domestic servitude, but kept in a species of state slavery. As late as the seventeenth century the Spaniards sent their prisoners to the galleys, and purchased Algerine captives from the Dutch, who did not employ slaves themselves, but seem to have had no objection to selling into slavery those whom they captured in war.<sup>1</sup> The custom of enslaving prisoners of war died out in Europe early in the eighteenth century, except as regards Turkey and the Barbary States more or less dependent upon her. As the Porte came more and more into the society of the Western powers it conformed to their usages; but hostile operations, such as the bombardment of Algiers by Lord Exmouth in 1816, were necessary before the Barbary pirates could be taught to respect the rules of civilized warfare. Grotius declares that Christians ought to be content with ransom and refrain from reducing one another to slavery.<sup>2</sup> The custom of allowing prisoners of war to ransom themselves seems to have become general in the Middle Ages. Captives were held to belong to their captors, who made bargains with them for payments of money in consideration of release. The common soldiers, who could not raise the funds wherewith to redeem themselves, were vilely treated and occasionally slain. Sometimes prisoners whose ransoms had been fixed were given away as presents, or transferred in payment of a debt like bank-notes or bills of exchange. In the fourteenth century the practice arose of fixing a price by the payment of which the king could buy prisoners of rank from their captors. The next step was to establish a fixed tariff for the ransom of prisoners of all kinds; and in the seventeenth century international agreements for ransom according to an established scale came into vogue, the money being paid by the state. About the same time we find exchange, which had been mentioned with approval by Grotius,<sup>3</sup> becoming common as an alternative to

<sup>1</sup> Manning, *Law of Nations*, IV., viii.

<sup>2</sup> *De Jure Belli ac Pacis*, III., VII., ix.

<sup>3</sup> *Ibid.*, III., XIV., ix.

ransom, and sometimes the two are joined together in one agreement. This was the case in the stipulations agreed to between England and France in 1780, which are said to be the last which recognize ransom. They valued a marshal of France, or an English admiral at sixty men. Officers of lower grades were assessed in proportion, and the equivalent of a man in English money was a pound sterling. Thus a marshal or an admiral could be exchanged for sixty men or ransomed for sixty pounds.<sup>1</sup> Exchange has been the rule in modern times and ransom has become obsolete. The most recent usage of all is that of releasing prisoners of war on parole, that is to say on receiving from them their word of honor not to serve again during the existing war against their captor or his allies. Generally none but officers are released on such terms, but sometimes whole armies or the entire garrisons of besieged places have been allowed to depart after giving the required promise. Occasionally a prisoner purchases liberty of movement within certain wide limits by promising not to attempt to escape. Breach of parole is punishable with death, if the individual guilty of it falls again into the power of his captors during the same war. According to modern International Law the right to detain prisoners ceases when the war ceases; and each side must then send its captives home. But up to the Peace of Westphalia of 1648 it was necessary to make special stipulations for such release without ransom; and in default of any arrangement of the kind the prisoners were detained in a captivity which, as we have just seen, amounted to a form of slavery.

Prisoners of war are to be treated with humanity. The restraints needful for their safe custody may be placed upon their movements; but their confinement ought not to be made more rigid than the necessity of the case demands. They must be fed and clothed by their captors, whose duty it is to put them in these respects upon a level with their

<sup>1</sup> Manning, *Law of Nations*, IV., viii.

own troops. They may be employed in useful work as long as it has no relation to the war, and is not excessive or derogatory to their rank or social position. The military authorities of the captor's country may allow them to undertake private work. The pay they receive for their services should be given to them on their release; but the cost of their maintenance may be deducted from it. Up to the end of the last century belligerents were expected to maintain their own soldiers and sailors who were prisoners in the custody of an enemy; but the modern practice is embodied in Article 27 of the code drawn up at the Brussels Conference of 1874, the opening words of which run, "The government in whose power are the prisoners of war undertakes to provide for their maintenance."<sup>1</sup>

It is often said that combatants only may be made prisoners of war; but exceptions to this rule are allowed in the case of those non-combatants who from their position and circumstances give direct aid to the enemy in his hostilities. Thus merchant sailors may be captured as being possible recruits for the fighting navy, and military police, telegraphists, balloonists and contractors, if present in the field of warlike operations. To these the Brussels Conference, adopting the provisions of Article 50 of the American Instructions, added correspondents and newspaper reporters,<sup>2</sup> but probably the worst that would happen to them if captured in civilized warfare would be expulsion from the lines of the captors. Members of the enemy's royal family, his chief Ministers of State and his diplomatic agents are liable to capture, even though they may not be actually engaged in hostile operations. Their position makes them so important to the enemy in the conduct of his war that they cannot be treated as ordinary non-combatants.

Military writers sometimes assert that a commander may destroy his prisoners if he finds himself placed in such a position that it is extremely dangerous either to keep or re-

<sup>1</sup> British State Papers, *Miscellaneous*, No. 1 (1875), p. 322. <sup>2</sup> *Ibid.*

lease them. It is difficult to say that under no imaginable circumstances would it be justifiable to kill prisoners; but we may at least lay down with confidence that the necessity must be very dire before so foul an outrage on humanity can stand excused. In 1799 Napoleon ordered the destruction of four thousand prisoners who had formed part of the garrison of Jaffa. To feed them was impossible, as his own troops were almost starving. He could not spare a detachment to escort them back to Egypt; and if he had dismissed them on parole they would at once have joined the enemy, for their religion absolved them from keeping faith with an infidel. In this terrible conjunction of circumstances the French commander and his officers discussed the fate of the prisoners for two days, and at last decided to order them to be shot, though they had surrendered on condition that their lives should be spared.<sup>1</sup> There can be little doubt that mercy would have been the better policy. The massacre inspired the garrison of Acre with such desperate courage that the French failed in all their assaults on the place, and were obliged to abandon their dream of Eastern conquest and retreat across the desert to Egypt.

### § 188.

The care of those who are injured in battle or on the march is one of those matters in which modern warfare shows to great advantage as compared with its ancient prototype. In these days

*Provision is made for tending the sick and wounded;*

whereas we hear little of wounded in the battles of antiquity, and the usual lot of enemies left helpless on the field was to be first plundered and then killed. Any of the victor's wounded who <sup>The care of the sick and wounded.</sup> could struggle off the scene of conflict might possibly be

<sup>1</sup> Allison, *History of Europe*, III., xxv.

cared for in the neighborhood; but no special provision appears to have been made for them till 1190, when at the great siege of Acre during the third Crusade the order of Teutonic Knights was founded to tend them. For a long time the task of caring for the sick and wounded was left to private benevolence; but in the seventeenth century a small number of surgeons and chaplains, and a few field hospitals, were provided by states for their armies. Since then there has been steady and continuous progress in this department of army organization. In modern wars state provision has been supplemented by private effort; and in some cases neutral societies and individuals have given aid from motives of humanity. But even now those who fall in struggles with barbarous or semi-barbarous tribes are sometimes exposed to terrible suffering. In 1799 Napoleon ordered his own sick and wounded to be poisoned at Jaffa during the retreat from Syria, rather than leave them behind to be tortured and massacred by the Turks.<sup>1</sup> The last great step in advance was the negotiation at Geneva in 1864 of a Convention regulating the care of the sick and wounded by a great international agreement which has now been signed by nearly all civilized powers, the United States having acceded to it in 1882.<sup>2</sup> It neutralizes hospitals, ambulances, surgeons, chaplains, nurses, and generally all persons and things connected with the care of the sick, provided that the badge of a red cross on a white ground is shown on a flag or on the arm as the case may be. Field hospitals captured by the enemy may be withdrawn by their staff when they are no longer needed; and in no case may the staff be detained as prisoners. Enemy wounded, when healed, are to be sent back to their country if they are incapable of further military service, and if able-bodied may be allowed to depart on condition of not serving again during the same war. The Convention needs revision on some points and

<sup>1</sup> Alison, *History of Europe*, III., xxv.

<sup>2</sup> *Treaties of the United States*, p. 1150.



additions on others. Voluntary assistance should be brought under stricter rules, and the contracting powers should make intentional violations of the Convention penal under their Articles of War, a step which they declined to take when it was proposed in 1868. In that year a number of additional articles were drawn up, relating chiefly, though not entirely, to warfare at sea; but they have not at present received ratification, and therefore cannot be regarded as binding in strict law upon the powers which have signed them,<sup>1</sup> though some of their provisions, such for instance as those which relate to the neutralization of hospital ships, will probably be acted upon by humane belligerents in future wars. The Brussels Conference in 1874 embodied in its proposed code the statement that the duties of belligerents with regard to the treatment of the sick and wounded are regulated by the Geneva Convention,<sup>2</sup> which thus received the sanction of whatever authority may be held to attach to the approval of the military representatives of the European states.

### § 189.

Sieges and captures by assault at the close of sieges remained the opprobrium of International Law long after humanity had won recognition in other departments of the field of warfare. The Roman rule was to spare a town which surrendered before the battering-ram touched its walls. But if any resistance was made, every living thing in the place was slaughtered. In the Middle Ages it was deemed an offence for a garrison to prolong a resistance which the besiegers regarded as fruitless; and not only were they slain without mercy if the place was taken by assault, but if it was finally given up some or all of them were executed. The demand of Edward III. of England for the lives of

The improved treatment of the garrisons of captured places.

<sup>1</sup> *Treaties of the United States*, p. 1153.

<sup>2</sup> *British State Papers, Miscellaneous, No. 1 (1875)*, pp. 322, 324.

twelve burghers of Calais, when it surrendered to him in 1347 after a year's siege, was a measure of exceptional mildness rather than exceptional severity. The revolt of the United Netherlands against Spain, and the wars of religion which followed it, furnished example after example of horrible barbarity inflicted not only on the armed defenders of captured places but also on the unarmed inhabitants. After the Thirty Years' War the slaughter of non-combatants by the soldiery who had forced an entrance into a beleaguered city came to be regarded as an atrocity; but it has been held in comparatively recent times that the defenders of a fortress taken by storm have no right to quarter. This was the opinion of the Duke of Wellington,<sup>1</sup> though his own practice was to make prisoners of any who surrendered themselves. In the Peninsular War the French repeatedly threatened Spanish garrisons with extermination if they stood an assault.<sup>2</sup> But Napoleon exacted from his own generals a tenacity he deemed criminal in an enemy. The commanders of his fortresses were instructed never to surrender without standing at least one assault, and those of them who did not hold out to the last were treated with great severity. But though the old rule which devoted to slaughter the defenders of places taken by storm has been shamefully tenacious of life, it has at length disappeared from modern warfare, and we are able to declare that

*The ancient practice of refusing quarter to the defenders of places taken by assault is now obsolete.*

Some remnants of it lurk in the theory that it is an offence to defend an open and unfortified town, or to resist in a weak place the attack of a vastly superior force. These views were always difficult of application. It was impossible to define the exact extent of defensive works which made a

<sup>1</sup> *Despatches, 2d Series, I., 93, 94.*

<sup>2</sup> Bernard, *Growth of the Laws of War* in the *Oxford Essays for 1856*, p. 111, note.

place into a fortress, or the exact measure of weakness which rendered a commander liable to extremities if he ventured upon resistance. And now the changed conditions of warfare have made them completely out of date. To-day earth-works are highly efficient fortifications, and they can be thrown up in a few hours and gradually strengthened till they are able to resist siege artillery. Plevna was a small open town when Osman Pasha determined to hold it as a defensive point in the summer of 1877; but by incessant spade labor and careful engineering, he turned it in a few weeks into a fortress, which the best troops of Russia assaulted three times in vain.<sup>1</sup> The distinction between fortified and unfortified places may therefore be said to have vanished. Every place is potentially a fortress, if its natural situation is favorable for defence; and no general would now claim the right to subject to military severities an army which held improvised works against his attack. Recent wars between civilized powers have afforded no instance of the slaughter of a garrison; and we may lay down with confidence that the defenders of a captured place are as much entitled to quarter as defeated soldiers taken on the battle-field.

### § 190.

The last point to note with regard to combatants is that

*Certain means of destruction are forbidden.*

It is now held that the sole object of warlike operations is to destroy the enemy's power of resistance and induce him to make terms as soon as possible. Consequently any applications of force which inflict more pain and suffering than is necessary in order to attain this end are forbidden by modern International Law. A bullet, for instance, will shatter an arm and render its possessor useless as a fighting man,

The prohibition  
of certain means  
of destruction.

<sup>1</sup> *Annual Register for 1877*, pp. 193-198.

just as well as a scrap of iron or glass which inflicts a jagged wound very difficult to heal. The use of such missiles is therefore prohibited; and the principle which condemns them is applied in other directions also. A feeling against treachery is the base of further prohibitions. All the forbidden methods of destruction will be discussed in the chapter on The Agents and Instruments of Warfare.

### § 191.

We have now to sketch the usages of war with regard to the persons of non-combatants. We have already seen that till the distinction between combatants and non-combatants was clearly and definitely embodied in the laws of war in the latter half of the seventeenth century, the unarmed inhabitants of an invaded country were liable to be slaughtered at the will of an invader, and were almost always exposed to shameful indignities, even though in Christian Europe it was not considered right to reduce them to slavery. But it must be remembered that the change to more humane methods did not take place in a moment without previous hint or warning. It was a matter of gradual growth. We find in ancient and mediæval warfare instances of humanity towards non-combatants which increase in number as time goes on, though occasionally there is a period of distinct retrogression, like the terrible Thirty Years' War, which was, however, followed by seventy years of rapid progress. When Henry V. of England invaded France in 1415, he forbade violence to the peaceful population and insults to women, and severely punished the perpetrators of such outrages, whereas less than a century before the track of the armies of Edward III. was marked by a broad line of fire and slaughter. The famous Chevalier Bayard was remarkable for his humanity to the inhabitants of invaded districts; and when the Earl of Essex took Cadiz in 1596 he permitted

The gradual amelioration of the condition of non-combatants.

the inhabitants to ransom themselves in a body and depart in English ships to a place of safety before the pillage began. They had, however, to be content to escape with nothing but the clothes they wore, saving and excepting some ancient gentlewomen who were allowed to put on two or three best gowns apiece. After the departure of the inhabitants the place was sacked and destroyed, with the exception of the churches and religious houses. Such proceedings would now be denounced as barbarous, but then the English were praised for their "heroical liberality." And certainly their conduct was an improvement upon the methods of coast warfare in vogue at the time and previously, when to descend upon the shores of an enemy, surprise and sack his seaports, hang the peaceful inhabitants over their own doorsteps, and set fire to the place on departing from it, were regarded as ordinary incidents of hostilities.<sup>1</sup> The beginning of the eighteenth century saw the general recognition of the rule that non-combatants were not to be subjected to slaughter or outrage. But nevertheless many severe practices for which no reasonable justification could be pleaded still remained as survivals of the older order. Thus the inhabitants of invaded districts were often compelled to swear fidelity and allegiance to the invading sovereign, and sometimes even to renounce their allegiance to their lawful rulers. In modern warfare no attempt would be made to interfere with their political fidelity, though while the armies of the enemy actually held a district in firm possession its inhabitants would be punished if they gave aid and information to their own side. The treatment accorded to non-combatants according to the best rules and practices of modern warfare may be described under the heads given in the sections which follow.

<sup>1</sup> Bernard, *Growth of the Law of War* in the *Oxford Essays for 1856*, pp. 97-99, 130-133.

## § 192.

The first rule we lay down with regard to this portion of our subject is that

*Non-combatants are exempt from personal injury, except in so far as it may occur incidentally in the course of the lawful operations of warfare.*

If civilians travelling in a train containing soldiers are shot in an attack upon it by the enemy, or if women, children and unarmed men are killed in the course of a bombardment, or during the capture of a village situated upon a battle-field, a regrettable incident has taken place, but no violation of the laws of war has been committed. But had the guns of the besiegers been deliberately turned upon the dwelling-houses of the bombarded town, or had an open and undefended village been fired into, the persons responsible for such proceedings would have been justly accused of barbarity forbidden by modern usage. A custom is springing up of allowing women and children to leave a besieged place before the commencement of a bombardment, but it is not sufficiently general to have acquired binding force. During the siege of Strasburg in 1870 the Germans on two occasions allowed non-combatants to pass through their lines into a place of safety; but a few months later they declined to permit "useless mouths" to depart from Paris before the bombardment commenced, because it was the intention of their commanders to reduce the city by famine rather than capture it by fighting.

The peaceful inhabitants of an invaded country, who are content to go about their ordinary avocations and submit to the lawful demands of the invaders, have a right to protection for life and limb and family honor. The exercise of their religion should be freely allowed, the law of the land with regard to private rights should be permitted to remain in

The extent of the exemption of non-combatants from personal injury.

force, and the population should not be compelled to take part in military operations against their own country. But the invaders may demand the services of guides to lead them from one place to another, and they may impress drivers for provision wagons and vehicles of all kinds. Any resistance to the exercise of these rights may be severely punished, and a guide who wilfully misleads may be put to death. Hostages may be taken for the fidelity of guides, the payment of war contributions and other purposes; but the laws of war no longer allow them to be executed if the obligation for the performance of which they are pledges is not duly fulfilled. The protection accorded to non-combatants is conditional upon good behavior on their part. They must not perform acts of war against the invaders while purporting to live under their rule as peaceful civilians. An inhabitant of an occupied district who cuts off stragglers, kills sentinels, or gives information to the commanders of his country's armies, may be, and probably is, a high-souled and devoted patriot; but nevertheless the laws of war condemn him to death, and the safety of the invaders demands that they be carried out in their full severity. Indeed the innocent may often be made to suffer instead of the guilty; for an enemy is within his rights when he seizes and punishes the leading men of a district because he is unable to discover the perpetrators of offences against him which have been committed within it. Every citizen of an invaded province can be either a combatant or a non-combatant; but he cannot combine the characteristics of both. If he elects to fight, he must join the armed forces of his country, in which case he will be entitled to receive the treatment accorded to soldiers. If he prefers to be a peaceful civilian, he must go about his ordinary business and refrain from interference in the struggle. The enemy will then be obliged to protect him from outrage and plunder on the part of the invading army. But if he varies peaceful pursuits with occasional acts of hostility, he does so at the peril of his life.

## § 193.

The next point to notice with regard to the treatment of non-combatants is that

*The inhabitants of captured towns are not to be abandoned to the violence of the victorious soldiery.*

Such atrocities as the sack of Magdeburg in 1631, when thirty thousand people — men, women and children — were massacred with every circumstance of cruelty by Tilly's troops amidst the wreck of their burning homes, would be impossible to-day in warfare between civilized states. The last European instance of the indiscriminate slaughter of garrison and people is to be found in the capture of Ismail by the Russians in 1790. But scenes not greatly inferior in horror have occurred since; and strong measures are still needed to bring the provisions of military codes up to the level of common justice and humanity in these matters. During the Peninsula War, the successful assaults on Ciudad Rodrigo, Badajos, and San Sebastian were followed by terrible excesses perpetrated by a maddened soldiery upon the defenceless inhabitants. The French in 1837 sacked Constantine in Algeria for three days. After the recapture of Delhi in 1857 the English officers were able to save most of the women and children of the mutineers, but many of the male inhabitants of the place were killed along with those of the garrison who did not succeed in escaping. The invariable excuse put forth on these occasions is that the troops cannot be restrained. This may possibly be true of savage or semi-barbarous soldiers, whose employment on such a service, though not forbidden by International Law, is a disgrace to civilized warfare. But it is not true of armies recruited from the populations of the leading nations of the world, who pride themselves upon their humanity and enlightenment. It may be granted that of all the tasks which fall to a soldier's lot none is more



likely to obliterate the man and awaken the brute in him than the storm of a well-defended fortress. In one awful struggle at the breach are concentrated all the horrors of an extended battle-field, and those who survive the assault are apt to rage like wild beasts among the unfortunate inhabitants. But they can be recalled as soon as the town is gained, and their places supplied by fresh divisions; or, if this is impossible, a body of military police might follow the storming columns and sternly repress attempts at theft or massacre. The plea that the soldier must be rewarded for his exertions by the plunder of the captured place is simply infamous. Undoubtedly the service is one of exceptional danger; but a promise of money payments, decorations and promotions would be amply sufficient to evoke the full courage and enthusiasm of the storming party.<sup>1</sup> If the fulfilment of this promise was made conditional upon good behavior, and it was understood that plunderers would be put in irons, and ravishers and murderers shot, there would be little to complain of in the conduct of the troops.

Fortunately the great advances made in the art of fortification since the beginning of the present century, and the vastly increased power of modern artillery and small arms, have greatly reduced the chances of the repetition in struggles between civilized states of such scenes as have tainted with disgrace some of the most heroic achievements of comparatively recent warfare. Towns are now defended by forts and earthworks erected at a considerable distance from them. There is therefore but little danger of the rush of an infuriated soldiery into the streets after a successful assault. In the last great war in which European states were engaged — the war of 1877-1878 between Russia and Turkey — Kars was the only fortress taken by storm, and after its capture there was no wild scene of rapine and murder. In the American Civil War Richmond fell as soon as the lines of Lee were pierced at Petersburg; and before the soldiers of

<sup>1</sup> Napier, *Peninsula War*, VI., 217.

the Union could reach the city the Confederates had time to evacuate it, after setting fire to the government stores and thus causing the destruction which their victorious foes endeavored to prevent. And while both the temptations to excess and the opportunities for it are less than before, the sentiments which have caused the general improvement in the laws of war have not left untouched the department of them which deals with sieges and assaults. The Brussels Conference of 1874 laid down that "A town taken by storm shall not be given up to the victorious troops to plunder;"<sup>1</sup> and we may be allowed to hope that the military codes of all civilized states will soon make such proceedings penal.

#### § 194.

The last point to notice in connection with non-combatants is that

*Special protection is granted to those who tend the sick and wounded.*

This was the work of the Geneva Convention of 1864. Till then it was doubtful whether army surgeons captured by the enemy would be held as prisoners of war. In the eighteenth century they were captured, but on an exchange were returned without equivalent or ransom. In the present century practice has not been uniform and text-writers have been unable to agree. The Instructions issued to the armies of the United States in the American Civil War forbade their detention unless the captors had need of their services. But the Geneva Convention went further and neutralized them altogether, along with nurses, chaplains, and all attendants upon the sick and wounded.<sup>2</sup> They may not, therefore, be held as prisoners of war; and though they are expected to remain and care for those who were under their charge when taken

The special protection granted to those who tend the sick and wounded.

<sup>1</sup> British State Papers, *Miscellaneous*, No. 1 (1875), p. 321.

<sup>2</sup> See § 188.

by the enemy, they are free to depart at any moment. The Convention contains further stipulations in favor of inhabitants of an occupied district who receive the sick and wounded into their houses and tend them there. No troops are to be quartered upon them, and they are to be indulgently treated in the matter of war contributions. The Additional Articles of 1868 imposed upon the staff of a captured hospital or ambulance the obligation of remaining with those under their care till their services were no longer needed, and qualified to some extent the absolute immunity from the quartering of troops granted by the original convention to houses where wounded men were cared for. But as these supplementary provisions have not been ratified by the contracting parties, they can hardly be considered binding, though no doubt some of them will be acted upon from motives of humanity in future wars between civilized powers.<sup>1</sup>

<sup>1</sup> *Treaties of the United States*, pp. 1150-1153.

## CHAPTER IV.

### THE LAWS OF WAR WITH REGARD TO ENEMY PROPERTY ON LAND.

#### § 195.

UNDER the above head we will first consider the case of  
*Enemy property found within a state at the outbreak of war.*

Such property may belong to the enemy state or to its subjects. The first case is exceedingly unlikely to arise; for a state does not in its corporate capacity own real property in its neighbors' territories, and if it should possess personal property so situated, it would take care to withdraw any of its goods and chattels that were in the power of a probable foe as soon as relations became so strained that war was likely to break out. It is, however, just possible that the commencement of hostilities might find public ships, or treasure, or arms and military stores belonging to one belligerent, still remaining within the territories of the other. In that case they would undoubtedly be confiscated; but such things as books, pictures, statues, curios and ancient manuscripts would probably be regarded as exempt from the operations of warfare and restored accordingly.

Property of the  
enemy government  
found within a  
state at the out-  
break of war.

#### § 196.

At the outbreak of war a state frequently discovers within its borders a considerable amount of private property belonging to subjects of the enemy. In dealing with such a case

we shall find it convenient to give separate consideration to real and personal property, and to take first the case of real property or immovables. The mediæval rule was to confiscate such property as soon as hostilities began, and not till the commencement of the eighteenth century do we find germs of the contrary practice. In 1713, at the Peace of Utrecht, France, Savoy, the Netherlands and the Empire covenanted to restore to enemy subjects all immovables confiscated during the war. Opinion and practice moved rapidly in the direction of lenience, and by the middle of the century Vattel<sup>1</sup> was able to limit the right of a belligerent to the sequestration during the war of the income derived from such lands and houses within his territory as belonged to subjects of the hostile state. During the latter half of the last century general custom followed the rule indicated by the great French publicist; but towards the close of it we find in treaties of peace provisions for the removal of the sequestrations, a sure sign that even the less severe mode of dealing with the property in question was beginning to be condemned by enlightened opinion. The growth of the practice of allowing enemy subjects resident in a country to continue there unmolested during the war<sup>2</sup> carried with it permission for them to retain their property; and in modern times the real property of enemy subjects has not been interfered with by the belligerent states in whose territory it was situated, even when the owners resided in their own or neutral states, the one exception being an Act of the Confederate Congress passed in 1861 for the appropriation of all enemy property found within the Confederacy, except public stocks and securities.<sup>3</sup> This proceeding was deemed unwarrantably severe, and contrary usage has been so uniform that we may safely regard the old right to confiscate or sequester as having become obsolete through disuse.

<sup>1</sup> *Droit des Gens*, III., v., § 76.

<sup>2</sup> See § 184.

<sup>3</sup> Halleck, *International Law* (Baker's ed.), I., 489, note.

## § 197.

Personal property or movables remained subject to confiscation if found in an enemy's country at the outbreak of war for some time after mitigations of the old severity began to be applied in the case of real property. But we find indications of a change of sentiment in numerous treaties negotiated during the eighteenth century, whereby each of the contracting parties agreed to grant to subjects of the other a fixed period for the withdrawal of mercantile property, should war break out between them. These stipulations have been followed by others extending up to the present time. They mark a considerable advance; but some of them refer only to movables connected with commerce, and leave other kinds of personal property unprotected. Moreover till the end of the Napoleonic wars the mediæval rule of confiscation was often applied in the absence of special stipulations overriding it. But it was too severe for public opinion; and in the treaties of the time there are a number of provisions for mutual restoration at the conclusion of peace. Since the Treaties of Vienna of 1815 the only instance of confiscation is to be found in the Act of the Confederate Congress alluded to in the previous section.

This being the state of the facts, what are we to say as to the state of the law? The doctrine of the British and American courts, that war renders confiscable enemy property found within the state at the outbreak of war, but does not *ipso facto* confiscate it, was regarded as correct at the beginning of the present century. It was laid down by the Supreme Court in the case of *Brown v. the United States*,<sup>1</sup> when it was further decided that by the Constitution an Act of Congress was necessary to effect confiscation, whereas in Great Britain a Royal Proclamation was sufficient. But it may be questioned whether the old law is still in existence.

<sup>1</sup> Cranch, *Reports of U. S. Supreme Court*, VIII., 110.

For nearly a century it has not been acted upon, save in the one instance of 1861; and the circumstances under which this solitary return to former severity took place deprive it of much weight as a precedent for international action. What is done by the weaker party in a bitter civil war is hardly a guide for ordinary belligerents in a struggle between independent states. If we are right in arguing from the practice of nations to the law of nations, we shall hardly be wrong in asserting that the general usage of civilized powers extending over a period of eighty years is sufficient to justify us in regarding the contrary usage of a previous period as no longer a sufficient foundation for a rule which will have authority to-day. The most conservative estimate of the situation compels us to say that the right to confiscate under the circumstances we have been considering is rapidly coming to an end, if it has not already ceased to exist.

An attempt made early in the present century by the British Court of King's Bench to set up a distinction between private debts and other kinds of personal property, and to enforce with regard to the former a rule of non-confiscation while the latter remained subject to belligerent seizure, demands careful examination. In 1807 war broke out between Great Britain and Denmark, and Danish ships and goods found in British ports were seized to the value of £1,265,000. The Danish Government retaliated by a similar confiscation, which included all debts due from Danish to British subjects, the total sum thus obtained being about £250,000. After the restoration of peace an English merchant, named Wolff, sued his Danish debtor, Oxholm, for a sum of money due to him before hostilities commenced. The defence was that the money had been paid into the Danish royal exchequer in obedience to an order of Sept. 9, 1807. But Lord Ellenborough, then Chief Justice, decided against its validity in 1817, and gave judgment for the plaintiff on the ground that private debts were contracted under the protection of the laws and therefore

were not liable to confiscation.<sup>1</sup> It is difficult to see in what way the public faith is specially pledged to the repayment of private debts. It is true that creditors of one nationality allow payment for goods supplied to debtors of another nationality to be deferred, because the law of the latter gives them a remedy in case of non-payment. But it is equally true that ships of one country venture to trade in the ports of another country, because the law of the latter protects and encourages their commerce. In both cases the business concerned is carried on subject to the risks of war. What these are we have to discover from extraneous sources of information. They cannot be inferred from the nature of the transactions. As Hall points out,<sup>2</sup> Lord Ellenborough was mistaken in supposing that the ordinance of the King of Denmark was unprecedented "for something more than a century." There had been several recent examples of the confiscation at the commencement of a war of private debts due to enemy subjects as well as other kinds of personalty. Incorporeal property, with the single exception to be mentioned in the next section, was under no special protection; and the decision in favor of its exemption was unsupported by history. No further attempt has been made to draw an untenable distinction. At the time when the Court of King's Bench gave its decision both kinds of property were subject to confiscation. At the present time both are either free from hostile seizure altogether, or in process of becoming so very soon. But though, in the absence of any state act confiscating private debts due to subjects of the enemy, the right to demand them is not destroyed, it is suspended during the war. An enemy subject has no *locus standi* in the courts of a belligerent state. He cannot, therefore, bring any action for payment while hostilities last, but his right to do so revives at the conclusion of peace.

<sup>1</sup> Maule and Selwyn, *King's Bench Reports*, VI., 92.

<sup>2</sup> *International Law*, 438, note.



## § 198.

There is one kind of personal and incorporeal property which is clearly exempt from confiscation. There can be no doubt that long usage and a due regard for self-interest compel belligerent states to refrain from confiscating the stock held by subjects of the enemy in their public loans, and to pay the covenanted interest on such stock during the continuance of the war. The question came up for discussion during the famous Silesian Loan Controversy<sup>1</sup> between Great Britain and Prussia in the middle of the eighteenth century. In the year 1752 Frederick the Great of Prussia confiscated funds due to British subjects in respect of a loan secured upon the revenues of Silesia. The money had been originally lent to the Emperor, Charles VI.; but when Silesia was ceded to Prussia in 1742 by Maria Theresa, his successor in the Austrian dominions, Frederick agreed to take upon himself all the obligations connected with the loan. Ten years after he laid hands upon the property of the British stockholders, in retaliation for the capture and condemnation by Great Britain of neutral Prussian merchantmen under circumstances deemed unlawful by the jurists whom he consulted. The British government replied to their arguments in a masterly state paper, due chiefly to the pen of Murray, the Solicitor General, who was afterwards the great Lord Mansfield. "It will not be easy," ran the document, "to find an instance when a prince has thought fit to make reprisals upon a debt due from himself to private men." And then, after pointing out the essential injustice of such a proceeding, and invoking public faith against confiscation "because a prince cannot be compelled, like other men, in an adverse way in a court of justice," it went on to show that by international usage the much stronger provocation of actual war did not justify reclamations upon the public debt in the

The special case  
of stock held by  
enemy subjects in  
the public debt.

<sup>1</sup> C. de Martens, *Causes Célèbres*, II., 1.

words, "So scrupulously did England, France and Spain adhere to this public faith that even during the war (*i.e.* the war terminated by the Peace of Aix-la-Chapelle in 1748) they suffered no inquiry to be made whether any part of the public debt was due to subjects of the enemy, though it is certain that many English had money in the French funds and many French had money in ours." On this and other points raised during the controversy the British argument is generally admitted to have been triumphant. The assertion of the Prussian jurists that by the common law of nations, as it stood at that time, the goods of enemies were free from seizure when found in neutral vessels and the goods of neutrals laden on board enemy vessels were not liable to capture and condemnation, was as baseless as their attempt to prove that reprisals might be made upon stock in the public debt held by subjects of the offending country. Undoubtedly Prussia had a real, though small, grievance against Great Britain; for British Prize Courts had condemned Prussian vessels carrying materials for ship-building, though the British Minister for Foreign Affairs had declared to the Prussian Envoy that such cargoes would not be regarded as contraband.<sup>1</sup> The controversy was settled in 1756 by the Treaty of Westminster, whereby Prussia agreed to remove the sequestration placed upon the Silesian Loan, and Great Britain covenanted to pay an indemnity of £20,000 for the benefit of Prussian subjects who had suffered wrongfully by her captures. The unbroken practice of civilized states for generations past, and the unanimous voice of statesmen and jurists, render the principle that stock in the public debt held by enemy subjects should be exempt from seizure, an undoubted rule of modern International Law. We may go further, and say that the interest on such stock must be paid even while the war is going on. The real reason for the rule is probably to be sought rather in the exigencies of public credit than in the sanctities of public

<sup>1</sup> Manning, *Law of Nations* (Amos's ed.), 294.

faith. It is difficult to see how the obligations undertaken by a state with regard to the money it has borrowed are more sacred than its other obligations towards private individuals. But there is no difficulty in understanding that the rate of interest on a loan which might be confiscated in the event of war between the borrowing country and the country of the lender would be very much higher than the rate on an unconfiscable stock. States desire to borrow on as easy terms as possible, and therefore they are glad to give lenders the benefit of the most complete security.

### § 199.

Having dealt with the various kinds of enemy property found within a belligerent state at the outbreak of war, we now pass on to consider the treatment to be accorded by an army to movables and im-  
Booty.  
 movables under its control, if they are tainted with the enemy character. In this connection we will deal first with

#### *Booty,*

which may be described as private movables taken from the foe in the course of such warlike operations on land as the capture of a camp or the storming of a fort. Booty must be distinguished from contributions and requisitions, which are a sort of extraordinary taxation levied by military authority on occupied districts. By the strict rules of International Law it belongs to the state whose soldiers have captured it. They are acting as the agents and instruments of their government. What they do is done by its authority, and what they acquire is acquired on its behalf. War gives them no right to enrich themselves at the expense of the enemy. The spoil they take is not theirs but their country's. This was the ancient Roman theory, and it is the theory of the modern law of nations. But in practice the regard paid to it is by no means as strict as could be wished, and it is

impossible to prevent the appropriation of many articles taken as spoil of war. Recognizing this, the laws of every civilized state provide that the whole or a part of the captured property should be given to the captors according to a scale drawn up by the proper authorities. In England the distribution of Booty is determined by the Crown under the advice of the Lords of the Treasury. In the United States it appears to be held that, in the absence of any act of Congress dealing with the matter, the President, as Commander-in-chief, has power to regulate it.<sup>1</sup> In order that proprietary rights in Booty may vest in the state whose soldiers capture it, they must have had it in firm possession for twenty-four hours. If it is recaptured by the enemy before that time it reverts to the original owners, on the theory that they have not been dispossessed of their proprietary rights in it. State property, such as arms, stores and munitions of war, found in a captured camp or fort, or on a battle-field, belongs to the government of the victors.

### § 200.

We have next to investigate the important subject of

#### *Belligerent occupation.*

The rights gained thereby are so numerous and far-reaching that it is necessary to define with great care the exact circumstances which call them into existence. Much light will be thrown upon the question by a short historical review of the methods followed by invading armies when dealing with property in the districts overrun by them.

Belligerent occupation historically considered.

It is not to be supposed that in ancient and mediæval warfare property would be spared where life was freely taken. Accordingly we find unlimited plunder and destruction the rule not only in classical times, but also in periods far more

<sup>1</sup> Halleck, *International Law* (Baker's ed.), II., 117-123.

nearly approaching our own. When the English under Edward III. landed in Normandy in 1346, they spread themselves over the country, burning and plundering up to the very gates of Paris. In the wars of the Armagnacs and Burgundians in France so terrible was the devastation that hungry wolves battled for food in the streets of the capital. The French invasions of Italy at the end of the fifteenth and the beginning of the sixteenth centuries were undertaken without magazines or money. The troops lived on the country, which they ate up like locusts. The atrocities of the Thirty Years' War are too well known to need description. The phrase, to plunder after the German fashion, became a proverb. So terrible was the famine caused by the war that in some districts bands of men and women took to the woods and lived by cannibalism. While Gustavus Adolphus lived the Swedish troops were restrained from pillage, but after his death in 1632 they gradually lost their former discipline and became as great adepts in plunder and torture as the Imperialists.<sup>1</sup> Even Grotius was obliged to admit that "by the Law of Nations . . . any one in a regular war may, without limit or measure, take and appropriate what belongs to the enemy."<sup>2</sup> But when he endeavored to enforce *temperamenta belli*, he argued that even in a just war men should not capture more than was necessary for their own safety, unless it was morally due to them either as a debt or by way of punishment. He added that the injured side, if it abounds in wealth, should not exact the utmost farthing, and spoke with approval of the custom of sparing the lands of cultivators and the goods of merchants, and only taking tribute from them.<sup>3</sup> Rules based upon the notion that war is a punishment have not found their way into International Law; but the other idea of

<sup>1</sup> Bernard, *Growth of the Laws of War* in the *Oxford Essays for 1856*, pp. 97-101.

<sup>2</sup> *De Jure Belli ac Pacis*, III., VI., II.

<sup>3</sup> *Ibid.*, III., XII., XIII.

Grotius that the invader should measure his acquisitions by his necessities was fruitful of good. In the next great cycle of European wars Marlborough and Eugene and their French opponents kept strict discipline in their armies. Requisitions took the place of indiscriminate plunder, and the avocations of peaceful life went on amidst the movements of the contending forces. Now and again the old ferocity broke out. The Palatinate was devastated in 1688 by the orders of Louis XIV. and his minister, Louvois; and in 1704 Marlborough ordered a part of Bavaria to be laid waste, in order to punish the Elector for adhering to the French alliance and induce him to quit it. But proceedings such as these shocked the conscience of Europe, even when the memory of Mansfeld and Wallenstein was still fresh.<sup>1</sup> They have not passed altogether unimitated in some recent wars, though the worst devastations of modern times do not approach in destructive cruelty to those of only two centuries ago. It is now the undoubted rule that pillage must be strictly forbidden, and humane generals not only forbid it but inflict severe punishment upon those who disobey their order. When Wellington entered France in 1813 he found that his prohibitions of plundering were too often disregarded. He therefore threatened to send back the Spanish troops if they persisted in their attempt to wreak vengeance on the French peasants for the atrocities committed in Spain by the armies of Napoleon. With his own troops he was still more severe. He sent to England under arrest several officers who had been guilty of marauding, and hanged private soldiers who plundered in defiance of his orders.<sup>2</sup> In doing this he did no more than is now usually done by civilized commanders. General Scott in the Mexican War and General Grant in the War of Secession did their best to restrain their troops from pillaging; and

<sup>1</sup> Bernard, *Growth of Laws of War*, 101-104; Hosack, *Law of Nations*, 260, 261.

<sup>2</sup> Napier, *Peninsula War*, VI., 268.

by the Instructions for the Government of Armies of the United States in the Field, published in 1863, "all robbery, all pillage or sacking, even after taking a place by main force, . . . are prohibited under the penalty of death."<sup>1</sup> The rules drawn up by the Brussels Conference of 1874<sup>2</sup> and the Code agreed to by the *Institut de Droit International* in 1880<sup>3</sup> agree in prohibiting pillage. But though promiscuous plunder is strictly forbidden to unauthorized soldiers, it is never entirely absent, and the most careful and humane of generals finds himself unable to give absolute protection to the property of the inhabitants of an invaded country, especially when he is at the head of a large army in whose ranks are sure to be found a considerable number of bad characters. War at the best is a terrible business, and those who enter upon it without absolute necessity, or clamor for it in mere lightness of heart, take upon themselves a fearful responsibility. It is possible, however, by the use of proper precautions and severe punishments to reduce pillage to a minimum; and self-respecting states should see that their armies are under proper regulations in this as in other matters.

But it must not be supposed that the absence of pillage means absolute security for enemy property. An invading general may purchase in the ordinary way provisions and other articles required for the consumption of his soldiers, or he may take them at prices fixed by himself, or he may compel the inhabitants to furnish them without payment and, if they refuse, send out detachments to collect them. The last course was taken by the French commanders in the Napoleonic Wars and by the Germans when they invaded France in 1870-1871. It is the course usually followed by the armies of Continental Europe, and was adopted by the generals of the United States in their invasions of the South

<sup>1</sup> Davis, *Outlines of International Law*, Appendix A.

<sup>2</sup> British State Papers, *Miscellaneous*, No. 1 (1875), p. 323.

<sup>3</sup> *Tableau Général de L'Institut de Droit International*, p. 183.

during the great Civil War. Great Britain pays as a rule for all goods supplied to her soldiers by the people of the enemy's territory. Wellington purchased the supplies he did not carry with him when he overran Southern France in 1813 and 1814, and General Scott followed this example during the invasion of Mexico by the forces of the United States in 1846 and 1847.<sup>1</sup> In the Crimean War the British bargained with the country people for what they bought, but the French fixed their own prices.<sup>2</sup> It seems then that, though private pillage is forbidden by the military codes of all civilized nations, war may nevertheless be made very burdensome to the inhabitants of an invaded country. In fact the superior humanity of land warfare exists more in name than in reality. Private property may still be captured at sea; on land it is exempt from seizure. There is a sharp contrast in the rules so far as words are concerned. But if we leave expressions and deal with facts, we shall find that a country may be swept bare of supplies to feed the soldiers who hold it down by hostile force. Peasants may be impressed to drive their own carts for the invaders. The produce of the farmer, the stock of the trader, the stores of the merchant, may go to fill the magazines of the enemy; and the slightest attempt on the part of the population to aid their fatherland by active means may expose them to all the horrors of military execution. It is true that the individual soldier is not allowed to plunder at his pleasure, but neither is the individual sailor. The capture of a merchantman is as regular and orderly a proceeding as the levy of a requisition upon a country town. In both cases private property is taken, but taken by disciplined agents of the enemy state acting under public authority. If there be any moral superiority, it is on the side of the maritime transaction; for a boat's crew engaged in the search and capture of a trading-vessel can be kept under more complete supervision

<sup>1</sup> Halleck, *International Law* (Baker's ed.), II, 111-113 and note.

<sup>2</sup> Bernard, *Growth of the Laws of War*, p. 109, note.



than a foraging party engaged in taking grain and stock from a country village; and, moreover, the presence of women and children in the one case and their absence in the other, suggest considerations which certainly do not favor the claim of superior humanity made on behalf of land warfare.

### § 201.

Since the rights of an invader towards the country overrun by him are so large and important, it is necessary first to define the circumstances under which he obtains them, and then to discuss their exact nature and limits. Originally no distinction was drawn in these respects between the conqueror of a territory and its temporary holder. Military possession was regarded as a sort of conquest, giving proprietary rights to the invader as long as he could maintain his possession. The practical result of this view was to confer on him all the power of a sovereign without a sovereign's responsibility. The theory seems to have been acted upon down to the middle of the eighteenth century. In 1712 the King of Denmark, being at war with Sweden and in belligerent occupation of the Swedish possessions of Bremen and Verden, sold them before the war was over to the Elector of Hanover,<sup>1</sup> thus assuming to himself when a mere occupant such a right of dominion as, according to modern usage, could spring from nothing but cession or completed conquest. Later still, during the occupation of Saxony by Frederick the Great in 1756, recruits were taken for the Prussian army from the population of the occupied kingdom.<sup>2</sup> This was by no means the only instance of the treatment of the inhabitants of invaded districts as if they were subjects of the invading state. The history of the time contains several others, and though few, if any, are found much later than the period we are considering, the theory on which they were based retained enough vitality

The essentials of  
belligerent occu-  
pation.

<sup>1</sup> Hall, *International Law*, § 164.

<sup>2</sup> *Ibid.*

to cause the Brussels Conference of 1874 to embody in its Code the statement that the population of an occupied territory cannot be compelled either to take part in military operations against their own country, or to swear allegiance to the enemy's power.<sup>1</sup> Vattel, writing in 1758, was the first jurist to scout the theory that a military possessor might perform acts of sovereignty, and to maintain instead that the rights of the original sovereign must first be ousted by a completed conquest or resigned by a definite treaty.<sup>2</sup> His views gradually influenced practice. Old customs that were inconsistent with them died out, and new doctrines were founded on improved usage. A sharp distinction is now drawn between completed conquest and belligerent occupation. The former we have already considered,<sup>3</sup> and with the rights conferred by it the Laws of War have no concern. It implies the cessation of the struggle and the establishment of a new political order. The chief questions of International Law connected with it were referred to when we dealt with the problems of state existence.<sup>4</sup> But the rights of occupancy concern us very nearly. They are incidents of hostilities, and amount to a temporary supercession of the authority of an invaded state, to an extent rendered necessary in order to reconcile the exigencies of the invaders with the safety and good order of the inhabitants of the occupied districts.<sup>5</sup>

As consequences of such vast importance flow from occupation, we must endeavor to obtain a clear understanding of its nature. It is necessary therefore to ask, What is an occupied district? Under what circumstances does an enemy possess the powers of an occupying belligerent? These are most important questions. Upon the answers to them depends the right of an invader to levy contributions and requisitions, to press the inhabitants into his service for

<sup>1</sup> British State Papers, *Miscellaneous*, No. 1 (1875), Arts. 36 and 37, p. 323.

<sup>2</sup> *Droit des Gens*, III., § 198.

<sup>3</sup> See § 98.

<sup>4</sup> See § 45.

<sup>5</sup> Acollas, *Droit de la Guerre*, pp. 61, 62

certain purposes, and to subject them to military execution for aiding their own side. It is obviously the interest of the great military powers to acquire these rights upon the most easy terms, and to stretch them as far as possible when acquired; and it is equally clear that the smaller states must adopt the opposite policy, since they cannot keep up vast standing armies, but are compelled to rely upon the patriotism and spontaneous activity of their inhabitants for adequate resistance to invasion. This conflict of views showed itself very clearly at the Brussels Conference of 1874. All the delegates agreed that territory through which an invading army has marched and over which it maintains its lines of communication is occupied by it. But differences of opinion arose as to territory in advance of the main army and on its flanks, and also as to territory won back temporarily by local resistance to the invader. In the war of 1870 between Germany and France, the German military authorities had adopted the view which Napoleon acted upon at the beginning of the century. They held that a district was occupied if flying columns, advanced parties, and even scouts and patrols, marched through it either without resistance or after having overcome the resistance of the regularly organized national troops. It was also part of their theory that, apart from voluntary evacuation, occupation came to an end only when the invaders were expelled by the regular army of their enemy. The German delegates at the Conference endeavored to enforce these views, but they were strenuously resisted by the delegates of the smaller states of Europe;<sup>1</sup> and in the end it was agreed that the first Article of the proposed Code should run as follows: "A territory is considered as occupied when it is actually placed under the authority of the hostile army. The occupation only extends to those territories where this authority is established and can be exercised."<sup>2</sup> These words might perhaps be more explicit,

<sup>1</sup> British State Papers, *Miscellaneous*, No. 1 (1875), pp. 235-239.

<sup>2</sup> *Ibid.*, p. 320.

but they certainly exclude what may be called constructive occupation, and confine the rights of the invader to the districts dominated by his military force. The phraseology of the Manual adopted by the Institute of International Law in 1880 is clearer. In Article 41 it declares that a territory is occupied when "the state from which it has been taken has ceased in part to exercise there its regular authority, and the invading state alone finds itself able to maintain order therein."<sup>1</sup> In fact occupation in land warfare is strictly analogous to blockade in sea warfare; and as blockades are not recognized unless they are effective, so occupation should be made to rest upon effective control. Its rights are founded on mere force, and therefore they cannot extend beyond the area of available force. But the force need not be actually on the spot. The country embraced within the invader's lines may be very extensive, and the bulk of his troops will, of course, be found on its outer edge opposing the armies of the invaded state. Any territory covered by the front of the invaders should be held to be occupied, but not territory far in advance of their main bodies. The fact that it is penetrated here and there by scouts and advance guards does not bring it under firm control, and therefore cannot support a claim to have deprived the invaded state of all authority therein. But the rights of occupancy, once acquired, remain until the occupier is completely dispossessed. The temporary success of a raid or a popular rising will not destroy them; but if an insurrection wins back the disputed territory, it is absurd to hold that they still exist because the occupying forces have not been driven away by regular troops. Rights founded on force expire when that force is overcome, no matter what the agency employed in overcoming it. It is impossible to travel with safety far beyond the statement that belligerent occupation implies, first firm possession, so that the occupying power has the country under its control and can exercise its will therein,

<sup>1</sup> *Tableau Général de L'Institut de Droit International*, p. 181.

and secondly a continuance of the *status* of belligerency, so that the invader has neither evacuated the territory he held nor become its sovereign.

## § 202.

We will now proceed to discuss the rights of an invader over property found in the districts occupied by him. It will be convenient to distinguish between state property and private property, taking first in each case the rules which relate to immovables, and secondly those which relate to movables.

Rights over state  
property gained  
by occupation.

With regard to immovables belonging to the invaded state, it is now settled law that the occupying belligerent shall "consider itself in the light of an administrator and usufructuary" only.<sup>1</sup> It may use the public lands, buildings, forests, and other real estate, and may take all the rents and profits arising from them. The troops of the invader may be quartered in public buildings, his administrative services may utilize them for offices, they may be turned into hospitals for his wounded, and even the churches may be taken possession of for purposes connected with the war. But wanton destruction is now regarded as an act of barbarity forbidden by the rules of civilized warfare. When, in 1814, the British burned the Capitol and the White House at Washington on the occasion of their temporary military occupation of the city, they brought upon themselves the reprobation not only of American statesmen and writers, but also of the publicists of the civilized world. The act was condemned next year by Sir James Mackintosh in the House of Commons. The only serious argument in its defence urges that it was done in retaliation for the burning of Canadian villages by the American forces in 1813.<sup>2</sup> Undoubtedly

<sup>1</sup> *Brussels Code*, Art. 7, see British State Papers, *Miscellaneous*, No. 1 (1875), p. 320.

<sup>2</sup> Maine, *International Law*, 198-199.

Newark, Saint David's, and a few other settlements were destroyed, and to that extent real provocation was given. But it is alleged that orders were misunderstood or disobeyed by the troops concerned, and it is certain that the government of the United States had not refused to make reparation. The least that can be said of the British proceedings is that the punishment was out of all proportion to the offence. Even Napoleon, who made war with an unscrupulousness shared by few great generals of modern times, respected the public buildings of the capitals he occupied.<sup>1</sup> All the modern Manuals and Military Codes forbid wilful damage to the real property of the enemy state in districts which pass under the power of an invader, and it is not likely that this prohibition will be disregarded in future warfare between civilized powers. It does not, however, apply absolutely to the public edifices of a place which is defended against the attacks of an enemy. Those of them which are used for military purposes must take the risks of war. They may be injured or destroyed by bombardment, or in any other way. But hospitals and buildings "devoted to religion, arts, sciences and charity" should be spared as far as possible. It is the duty of the defender to indicate them by visible signs and to refrain from using them for warlike purposes.<sup>2</sup>

The rule that an invader acquires, not the ownership, but only the right to use the public immovables he finds in the occupied territory, carries with it as a necessary consequence the further rule that he may not sell any portion of the state domain which he succeeds in bringing under his control. He may compel the tenants to pay their rents into his military chest, he may lop the forests and work the mines, he may appropriate to himself all ordinary profits; but he may not injure or destroy the *corpus* of the property in question, nor may he attempt to transfer it. Whatever may be

<sup>1</sup> Wharton, *International Law of the United States*, §§ 318, 349.

<sup>2</sup> *Brussels Code*, Arts. 16-18.

expressed on the face of any document, he can but make over his own chance of retaining by a good title what he now holds by the sword. Such a transaction would not be valid against the sovereign of the country, if his authority were restored during or after the war, but it would bind the occupying sovereign if he afterwards obtained the district by cession or completed conquest. Purchase during the war by a neutral state amounts to an abandonment of neutrality, which the dispossessed belligerent may lawfully resent by any means known to International Law. If the excluded sovereign sells, he simply parts with his chance of regaining the property, and the conveyance, though valid as against him, would have no force to bind the invading state should its occupation ripen into full ownership. Even its right of user is subject to exceptions, for the income derived from lands set apart for the support of "establishments devoted to religion, charity, education, arts and sciences" should not be diverted from its beneficent purposes to swell the resources of the occupying army.<sup>1</sup>

With certain exceptions, movables belonging to the invaded state may be appropriated by the invader. By the laws of war firm possession gives him a title to the things themselves, and not merely to the use of them. This rule applies not only to instruments and munitions of war, means of transport, and military stores and supplies, but also to the taxes, the funds and marketable securities of the state, and, in short, to all its revenues except any that may have been pledged before the war for the satisfaction of neutral creditors. The expenses of administration in the occupied districts should be the first charge upon the revenues received from them, and the local officials should be retained if they are willing to act; but the invader may appropriate any surplus that remains after order and efficient government have been provided for. Legal documents and state archives are exempt from confiscation, the former as being useless

<sup>1</sup> *Brussels Code*, Art. 8.

for belligerent purposes but important for the definition of private rights, and the latter as being possessed of a purely historical value. Modern usage extends the practice of exemption to objects exclusively useful for scientific and humane purposes, libraries and works of art. About these last a great controversy arose after the final downfall of the first Napoleon. During the wars of the revolutionary period, and especially during the Italian campaigns of 1796 and the following year, the French had carried off a large number of artistic masterpieces from other countries and deposited them in the Louvre at Paris. In 1815 the victorious allies insisted on the restitution of these works of art to the cities and galleries from which they had been taken, and ever since publicists have been divided in opinion upon the legality and policy of the act. Halleck sums up the case in the words, "We think the impartial judge must conclude, either that such works of art are legitimate trophies of war, or that the conduct of the allied powers in 1815 was in direct violation of the law of nations."<sup>1</sup> His argument proceeds upon the assumption that the pictures, marbles and bronzes in question were regarded by the various sovereigns as spoil which had come into their hands by the occupation of the capital of their foe. But this is an entirely mistaken view. The theory of the allies was that the captures were void *ab initio*, and that when the superior force of the captor was overcome the true owners came into possession again. They regarded themselves simply as undoers of the wrong France had done.<sup>2</sup> The question resolves itself into an examination of the lawfulness of the original seizures. And in dealing with this it is necessary to bring out in bold relief a fact which Sir Samuel Romilly emphasized in his famous speech on the Peace of Vienna in the House of Commons on February 16, 1816.<sup>3</sup> His remarks have been quoted again and

<sup>1</sup> *International Law*, Ch. XXI, § 10.

<sup>2</sup> Note of Lord Castlereagh quoted by Wheaton, *International Law*, § 352-353.

<sup>3</sup> Hansard, XXXII., 759, 760.



again, but few writers on the subject appreciate their full significance. He points out that many of the masterpieces under consideration had not been seized as spoil of war, but had become the property of the French state by the provisions of various treaties negotiated with their original owners. Though Sir Henry Maine takes note of this distinction, he does not seem to see its bearing upon the solution of the legal problem, and, following the example of other writers, deals with the restitutions in the mass instead of in detail.<sup>1</sup> His conclusion that the allies followed the rule of reprisal is not borne out by the facts of the case; for they confined their operations to the works of art taken by the French from other countries, and scrupulously refrained from laying hands on anything of the kind which had belonged to France before she started on her career of conquest. Clearly it is impossible to treat what had been acquired by virtue of belligerent occupation only, as on the same legal footing with what had been obtained by cession, such as the hundred pictures which were part of the price paid by the Pope for a truce and armistice in June, 1796, or the bronze horses which Venice surrendered by a secret article of the treaty of May, 1797.<sup>2</sup> It is absurd to argue that a victorious belligerent may lawfully enforce the transfer of a province, but not a picture, or that peace may be purchased by an indemnity of millions, but not by mosaics and marbles. What France had acquired in this way she held by a title known to International Law. To take it away from her was no act of police jurisdiction, but a high-handed proceeding which must rest for its justification upon considerations of public policy. The welfare of the world demanded that she should be deprived of Belgium and the Rhenish provinces. It might also demand that the galleries of the Louvre should disgorge the accumulated glories of the art of Western Europe. But in each case the cession was a forced transfer

<sup>1</sup> Maine, *International Law*, pp. 197, 198.

<sup>2</sup> Fyffe, *Modern Europe*, I., 118, 132.

to the conquerors of what was legally the property of the conquered. Possibly the conditions imposed by the victorious sovereigns were wise and just. We must judge them as we would the terms of any other peace; but we cannot say that in the matter of the restoration of the ceded pictures they enforced the restitution of property unlawfully in the possession of the vanquished. Very different considerations, however, apply to the works of art which had never been the subjects of any legal transfer, but were taken by the French during their belligerent occupation of territories they had overrun. This was sheer robbery. The laws of war then, as now, protected the contents of galleries and museums from seizure and confiscation.<sup>1</sup> Frederick the Great of Prussia made war with terrible severity, yet even he had been content with copies of the famous Dresden masterpieces. The French had introduced a new and barbarous practice into European warfare, and when they were made to refund their ill-gotten artistic gains, a useful lesson was read to all who might in future be disposed to imitate them.

### § 203.

We now come to the rights of the occupying state over private property in the occupied districts. Dealing first with immovables, we may lay down that as a general rule they may not be seized or destroyed, nor may they be used except so far as the necessities of war compel. The profits arising from them are to be free from confiscation, and the inhabitants are to be unmolested in all lawful use of them. Immovable property is bound up with the territory. As soon, therefore, as men recognized that invasion and temporary possession were widely different from completed conquest, it was clear that an invader could not acquire a firm title to lands and houses, or sell a title to a purchaser. Real property possessed by

Rights over private property gained by occupation.

<sup>1</sup> Acollas, *Droit de la Guerre*, p. 63.

private persons is held to be incapable of appropriation by an occupying belligerent; but the pressing and immediate needs of warfare may justify the destruction of buildings or their seizure for use as a fortified post. Troops may be quartered in private houses, though the inhabitants may not be forcibly ejected from their homes to make more room for the soldiers. But if non-combatants fire upon the invading forces from their dwellings, or use them for the purpose of committing other acts of unauthorized hostility, the laws of war give to the belligerent who suffers the right to inflict punishment by the destruction of the property in question, as well as by severities against the persons of the offenders. In warfare between civilized states it is found that, as a rule, nothing worse than temporary and severe inconvenience is experienced by those of the inhabitants of occupied districts who remain in their homes. They are able to take some care of their property, and can generally prevent wanton damage and destruction by promptly reporting any excesses to the officers in command. But those who abandon their dwellings and take to flight at the approach of the enemy are likely to find on their return little but the mere shell remaining. The houses will have been filled with soldiers from basement to garret, and their furniture and fittings will probably have been first subjected to the roughest treatment and then burnt for firewood. Unless there is any reason to anticipate personal violence, the best policy for the inhabitants in case of invasion is to stay at home and keep watch over their property. It can hardly escape diminution by means of requisitions and other exactions, but there can be no reason in the nature of things, and there is certainly none in the laws of war, why it should be destroyed.

The movables belonging to the non-combatant population of occupied districts may not be seized unless they are of immediate use in war. Such things as arms and ammunition are subject to confiscation even when they are the property of private individuals, but ordinary private property of a

personal nature is regarded as sacred, and a general ought to exercise the greatest care to prevent his troops from making free with it. But seizure may follow upon conviction of any offence against the code laid down by the invader; such, for instance, as giving information to the dispossessed authorities, or harboring their agents. Moreover, means of communication belonging to private individuals may be taken and used by the occupying forces. At the end of the war, however, they ought to be restored, and it is even asserted that compensation should be paid to their owners. The Brussels Conference of 1874 laid down this rule with regard to railway plant, land telegraphs, and steam and other vessels not included in cases regulated by maritime law.<sup>1</sup>

### § 204.

Strictly speaking, *Requisitions* are articles of daily consumption and use taken by an invading army from the people of the occupied territory, *Contributions* are sums of money exacted over and above the taxes, and *Fines* are payments levied upon a district as a punishment for some offence against the invaders committed within it. But the two former terms are used interchangeably in a loose and popular sense to signify anything, whether in money or in kind, demanded by an occupying force from the inhabitants of the country it has overrun.

The invader has an undoubted right to levy requisitions at his own discretion, and in most modern wars he has done so, sometimes leniently, sometimes severely. When Bonaparte entered Italy in 1796, he marched with few or no supplies of his own, and compelled the rich districts he subdued to feed and clothe his hungry and ragged regiments.<sup>2</sup> Throughout his career he endeavored, with marked success, to act upon the principle of making each war support itself.

<sup>1</sup> *Brussels Code*, Art. 6.

<sup>2</sup> Fyffe, *Modern Europe*, I., 116, 117.

Contributions as well as requisitions were levied with ruthless severity wherever the soldiers of the Republic and the Empire carried their victorious standards, till at length a French army became as terrible a scourge to the people as were the feudal exactions and seigniorial privileges swept away in consequence of its successes. France suffered through the constant drain upon its best blood to fill the gaps in Napoleon's ranks, and by the restrictions upon trade due to the Continental system, but till the last defensive struggle little of its wealth was directly taken for the expenses of constant warfare. The usual plan is to regard requisitions as a supplementary resource, and not as the main support of the invaders. In modern wars civilized armies have carried with them vast trains of provisions and other supplies, but even when thus provided, their exactions have sometimes been enormous. Baker, in his edition of Halleck,<sup>1</sup> gives a list of the daily supplies requisitioned by the Germans when they occupied Versailles during the siege of Paris in the winter of 1870-1871. They required,

120,000 loaves,	7,000 lbs. of roasted coffee,
80,000 lbs. of meat,	4,000 lbs. of salt,
90,000 lbs. of oats,	20,000 litres of wine,
27,000 lbs. of rice,	500,000 cigars.

In other portions of the field of hostilities similar demands were made, and sometimes the French armies were obliged to levy requisitions upon their own countrymen. It is calculated that in a war which lasted only six months the occupied districts of France were mulct in goods of all kinds to the extent of about \$80,000,000 or £16,000,000. Facts like these should be remembered by those who are inclined to attach much weight to the assertion that warfare on land is less destructive and more merciful than warfare at sea.

<sup>1</sup> *International Law*, II., 111, note.

Recent military codes contain a number of rules drawn up with the object of making the process of levying requisitions as orderly and as little burdensome as possible.<sup>1</sup> The best practice is for the commanders of detached corps to requisition objects of immediate use, such as food and fodder, while the commander of the whole army requisitions articles that take some time to supply, such as clothing and boots. The demand is made in writing, and receipts are given for the articles supplied, in order to afford proof to other commanders of the amount already exacted from the place, and to be evidence of its losses in case the government should recoup the suffering districts out of the general taxation of the country. The collection is generally made through the local authorities, and only when they have fled, or when there is not time to set them in motion, are soldiers detailed to bring in what is required. Requisitions should be proportioned to the needs of the troops and the resources of the occupied territory. In the rough and ready processes of actual warfare these rules are frequently broken. Yet they must not be regarded as mere counsels of perfection, fit only for some Utopian world in which war remains as a strange survival from a half-forgotten epoch of force and ignorance. They can be kept if commanders are determined men, and soldiers are trained in habits of obedience and self-restraint. Nearly five hundred years ago Henry V. of England prevented pillage, violence to unarmed peasants and insults to women, because he did not scruple to hang the Bardolphs of his army when they indulged their predatory instincts in churches and elsewhere.<sup>2</sup> What could be done with the rough archers and men-at-arms of mediæval England can be done with the civilized soldiers of the nineteenth century; and surely it is not too much to ask that, if war must still exist as the last resort of nations, it shall be purged of all unnecessary cruelties, and be in fact what it is in name,

<sup>1</sup> e.g. *Brussels Code*, Arts. 40, 42; *Acollas, Droit de la Guerre*, pp. 84-86.

<sup>2</sup> *Bernard, Growth of the Laws of War*, pp. 98, 99.

a solemn trial of strength between the public armed forces of the combatants.

Contributions, as distinct from requisitions, ought, so said the Brussels Conference, to be imposed "only on the order and on the responsibility of the general-in-chief, or of the superior civil authority established by the enemy in the occupied territory."<sup>1</sup> In levying them the assessment in use for the purposes of ordinary taxation should be followed as far as possible, and in all cases receipts should be given. On principle there is little to be said for these exactions of money, though they were resorted to by Napoleon to an extent which seriously impoverished whole provinces, and have not been altogether unknown since his time. We cannot venture to say with Professor Acolas that they are illegal,<sup>2</sup> because history testifies that they have not been banished from modern usage, and Military Codes drawn up by men who know from experience how hostilities are conducted recognize them as incidents of belligerent occupation. But the only case in which they are consistent with sound principle is when they are taken as an equivalent for payments which should have been made in kind. They may then be regarded as based upon the doctrine that in case of necessity a commander may feed his troops from the resources of occupied districts. In other cases they have no more respectable origin than the old practice of enrichment by plunder. Pillage is still pillage, even though it be reduced to system and carried on by rule and measure.

Little need be said on the subject of fines. They are levied upon a locality when an offence against the invaders has been committed within it and the guilty individuals cannot be discovered. The commander of an occupying force is bound to provide for the security of his communications and the safety of his soldiers. He cannot be expected to take no notice of the slaughter of his sentinels or the cutting off

<sup>1</sup> *Brussels Code*, Art. 41.

<sup>2</sup> *Droit de la Guerre*, pp. 85, 86, and note.

of his convoys by the inhabitants of a district which is in theory engaged under his protection in the pursuits of peaceful industry. In all probability the perpetrators of these deeds are high-souled patriots, but none the less must they be punished with extreme severity, if they are detected and caught. If not, the district itself must be held responsible, and no more humane method than a heavy fine can be devised for bringing its responsibility home to it.<sup>1</sup>

<sup>1</sup> The subjects referred to in the last four sections are dealt with in Manuals and Instructions issued by the governments of many civilized powers. The Instructions for the Government of Armies of the United States in the Field are printed in Baker's edition of Halleck's *International Law*, II., 38-51, and in Davis's *International Law*, Appendix A. The corresponding British Code has not been published, but Sir Henry Maine was permitted to quote from it largely in his *International Law*.



## CHAPTER V.

### THE LAWS OF WAR WITH REGARD TO ENEMY PROPERTY AT SEA.

#### § 205.

As a rule enemy property at sea is subject to capture whether it be of a public or a private character. But the mere fact of enemy ownership is not sufficient to render a vessel or its cargo liable to seizure and condemnation. And though exceptions to the rule of capture are more frequent in the case of goods than in the case of ships, in each they are sufficiently numerous to materially qualify the general principle. In order to deal with them according to a definite plan we will commence with a consideration of the rules of warfare applicable to

The extent to which public vessels of the enemy are liable to capture.

#### *Public Vessels of the Enemy.*

Ships belonging to a belligerent state may be attacked and captured in their own ports and waters, in the ports and waters of the attacking power, and on the high seas. Only in the territorial waters of neutral nations are they exempt from hostile operations. But the unbroken usage of naval warfare in modern times has decreed that public vessels exclusively engaged in the work of exploration, discovery and scientific research, shall be able to obtain from the enemy's government a pass which will protect them from hostile seizure as long as they take no part in belligerent operations. During the war of the American Revolution

Captain Cook pursued his discoveries unmolested by the French fleets, and the Austrian frigate *Novara* was not interrupted in its scientific expedition throughout the Italian conflict of 1859. But care is necessary to avoid misunderstandings, which may lead to the detention of the ship and the captivity of its crew. This fate befell Commander Flinders when, in 1803, he put into Port Louis in Mauritius on what he deemed was a perfectly innocent return journey after a voyage of exploration and survey along the coast of Australia. He had sailed from England with a passport from the French Minister of Marine, and had scrupulously obeyed his instructions to "act in all respects towards French ships as if the two countries were not at war." But at Sydney his original vessel, the *Investigator*, had been found to be rotten and unseaworthy, and he had exchanged her for the *Cumberland*, which was placed at his disposal by the Governor of New South Wales. The French authorities at Mauritius detained the ship and all within her on the grounds that she was not the vessel to which a passport had been given, and that there were suspicious circumstances connected with her entry into Port Louis. Flinders remained a prisoner till he was released on parole in 1810, and the *Cumberland* was retaken when Mauritius capitulated to the British in the same year.<sup>1</sup> The case shows the need of extreme care in carrying into effect arrangements between belligerent powers. There can be no doubt about the principle of the exemption of expeditions of discovery from the ordinary operations of warfare, but its application is not always free from difficulty.

Cartel ships are undoubtedly exempt from belligerent capture. They are vessels employed in services connected with the exchange of prisoners. In strictness each cartel vessel ought to be provided with a pass from a Commissary of Prisoners, but in its absence strong evidence of *bond fide* employment will save her from detention. It is not neces-

<sup>1</sup> Flinders, *Voyages*, II., Chs. III.-IX.

sary that she should have prisoners on board. She may be on a voyage to a port where she is to take them up, or on a return voyage after having delivered them at their destination. But she must not carry merchandise or despatches, still less must she perform any hostile acts. Belligerents may employ either public or private vessels in their cartel service; and as the rule of exemption applies to both, we have, for the sake of convenience, considered the matter here, where we are dealing with the immunities from hostile seizure accorded to public ships.

It is sometimes said that public vessels driven into an enemy's port by stress of weather, or entering it in ignorance of the outbreak of hostilities, must be allowed to depart unmolested. There is, however, no rule of International Law to that effect, and the history of naval warfare contains instances of capture as well as instances of abstention from capture.<sup>1</sup> The truth seems to be that if the exemption is granted, it is given as a matter of grace and favor, and cannot be demanded as a right. And probably the same may be said of hospital ships. It is exceedingly likely that in future naval wars humane belligerents will refrain from operations directed against the enemy's public vessels devoted entirely and exclusively to the care of the sick and wounded. But they are in no way obliged to do so. The additional articles of the Geneva Convention which were signed in 1868, are not binding on account of the absence of ratification; and even if civilized powers were to give their formal adhesion to the stipulations in question, they would not thereby pledge themselves to the neutralization of floating hospitals; for the clause of Article IX. which confers immunity from capture upon public vessels not equipped for fighting and designated for their humane purpose during peace, does not occur in the original French text, though it is found in the English version.<sup>2</sup>

<sup>1</sup> Halleck, *International Law*, Ch. XXII., § 24.

<sup>2</sup> *Treaties of the United States*, p. 1155 and note.

## § 206.

We will next endeavor to explain the liability to capture and condemnation of the

*Private Vessels of the Enemy.*

The nationality of a vessel is shown by the flag she flies and by her certificate of registry. It is true that a false flag may be hoisted; but the Right of Search is a protection to belligerents against such an obvious device. It is also true that by false declarations papers may be obtained which, though perfectly regular and given in good faith, secure for the ship registration as the property of a citizen of one country while it really belongs to a citizen of another. In the case of the *Virginus* the United States held that a certificate of registry was conclusive as between a merchantman searched by a foreign cruiser and the searching vessel. The government of the latter might, it was argued, impeach the validity of the papers through the ordinary diplomatic channels, but it might not presume to settle the question for itself by its agents on the spot, and allow them to act there and then upon the judgment they might form.<sup>1</sup> Whether or no it is possible to maintain this doctrine in its original breadth,<sup>2</sup> there can be no doubt that a ship's papers, if genuine, are conclusive as to its national character. But even when a vessel is shown to belong to a neutral owner, it will be treated as enemy property if it uses habitually the flag and pass of the enemy or sails under a license given by his government. And the same treatment will be meted out by a belligerent to his own subjects, should their vessels be found in a similar situation.

As a general rule, private vessels of the enemy may be captured wherever they are found, as long as they are not in

The extent to which private vessels of the enemy are liable to capture.

<sup>1</sup> Wharton, *International Law of the United States*, §§ 327, 409.

<sup>2</sup> Hall, *International Law*, § 86.

neutral waters. There are, however, certain exceptions, some of which rest upon usage so constant and so conformable to the more humane character of modern warfare that we may almost venture to say that they are embodied in the international code, while others have not progressed beyond the stage of comity, and could be ignored by a belligerent state without bringing down upon itself the charge of lawlessness. The exemption of fishing-boats from capture is a somewhat debatable point. Deep-sea fishing-vessels are treated like other enemy ships, but a practice of allowing the inshore fishermen of both belligerents to pursue their avocations without molestation has become very general. France holds that it is obligatory. The British doctrine that it is a rule of comity only was laid down by Lord Stowell in the case of the *Young Jacob and Joanna*.<sup>1</sup> The United States, under the influence of Franklin, pledged themselves to exemption in their treaty with Prussia of 1785, and the stipulation to that effect was renewed in 1799 and again in 1828.<sup>2</sup> The difference between the English and the French view is more apparent than real, for no civilized belligerent would now capture the boats of fishermen plying their avocation peaceably in the territorial waters of their own state, and no jurist would seriously argue that their immunity must be respected if they were used for warlike purposes, as were the smacks belonging to the northern ports of France when Great Britain gave the order to capture them in 1800.

In the eighteenth century states frequently commenced hostilities at a time when their ports were full of the enemy's merchantmen, which they seized as the first step in the active operations of warfare. The famous resignation of the elder Pitt in 1761 was caused by his inability to convince his colleagues that Spain contemplated war with England and their refusal to authorize the capture of Spanish vessels found

<sup>1</sup> Robinson, *Admiralty Reports*, I., 20.

<sup>2</sup> *Treaties of the United States*, pp. 905, 914, 919.

in British waters. But commercial interests and considerations of justice have now become so powerful that belligerents not only refrain from seizure in the circumstances we have just indicated, but reverse their former policy and give time for merchant vessels of enemy nationality to leave their ports after the outbreak of hostilities. At the beginning of the Crimean War in 1854 a period of six weeks was granted by both sides, and in the case of the Russian White Sea ports the days of grace were made to date from the opening of the navigation at the break-up of the ice, and not from the commencement of hostile operations. Moreover, trading-vessels on their way to enemy ports when the war began were allowed to enter and depart unmolested within the specified time.<sup>1</sup> Concessions of a like kind were made to each other by France and Prussia in 1870, and by Russia and Turkey in 1877. It is hardly likely that a privilege of such importance to merchants will be allowed to drop out of existence in these days of rapidly increasing trade, and we may look forward with confidence to the general adoption of the new practice. Moreover, it is exceedingly probable that private vessels engaged in works of discovery or humanity would not now be molested in a war between civilized powers. The Additional Articles of the Geneva Convention provide for the exemption from ordinary capture of hospital ships belonging to the recognized Aid Societies, and even merchantmen charged exclusively with the removal of the sick and wounded. But a certain amount of belligerent authority may be exercised over them, for those who receive attention on board are required not to serve again during the continuance of the war, and the cargoes of the merchant vessels may be confiscated if they are good prize by the law of nations.<sup>2</sup> The absence of ratification, however, makes it very doubtful whether these Additional Articles will be observed in every

<sup>1</sup> Hertalet, *Treaties*, X., 503; Wheaton, *International Law* (Dana's ed.), p. 389, note.

<sup>2</sup> *Treaties of the United States*, pp. 1155, 1156.

detail, even by powers who are willing to grant immunity of some kind. Humanity and chivalry rather than legal obligation will for some time to come decide the position of the vessels referred to in them, and also that of private vessels driven into an enemy's port by stress of weather or accident of the sea.

### § 207.

Having dealt with enemy vessels, we will now proceed to deal with the

#### *Sea-borne goods of the Enemy.*

The ancient rule was to capture them not only on board the ship of an enemy, but also on board the ship of a neutral. In the former case the ship and cargo were good prize, in the latter the cargo only, the ship being released by the Prize Court and its owner having freight granted to him from the sale of the condemned goods. Neutral vessels were in some cases condemned, for instance if they were endeavoring to run a blockade; but when they were engaged in ordinary commerce, and the only circumstance that led to their detention was the fact that they carried merchandise belonging to enemy owners, they not only escaped condemnation but even received freight. This was the rule of the *Consolato del Mare*,<sup>1</sup> and according to most English and American authorities it remains the rule of the common law of nations. But on this point, as on many others, a change is going on. The old order is decaying before our eyes, and for those who hold that the usage of nations when fixed and uniform is an unerring index to their law, it has become a serious question whether the statements that held good half a century ago should not be altered in consequence of the changed practice of modern times. For the movement in favor of the freedom from capture of enemy goods under a neutral flag, which began

The extent to which goods at sea are liable to capture.

<sup>1</sup> Pardessus, *Us et Coutumes de la Mer*, II., 292.

in the seventeenth century, gained a decisive victory in 1856, when the plenipotentiaries assembled at the Conference of Paris embodied the principle of "Free Ships, Free Goods" in the Declaration on Maritime Law with which they concluded their proceedings. Since that time the Declaration has been accepted by nearly all civilized powers, and though the United States has held aloof, along with a few countries of no great importance in naval affairs, both sides in its great Civil War adopted and acted upon the doctrine that a neutral flag covers enemy goods except contraband of war. We have then an agreement acceded to in set terms nearly forty years ago by the vast majority of the members of the family of nations, and, in addition, the subsequent practice of all powers in strict conformity with it, whether their signatures to the great international instrument in which it was embodied have been given or withheld. In the face of facts like these it is difficult to argue that International Law is unchanged, and that nothing more has happened than mutual promises on the part of several states that they will, in certain contingencies, substitute something else for one of its rules. On the other hand, there seems equal difficulty in asserting that a great power like the United States is bound before all the world to act in future maritime conflicts upon a clause in a diplomatic document to which she expressly refused her signature. In truth we are passing through a transitional stage. The final goal is clear, but it is impossible to say at any given moment exactly how far we have advanced in our journey towards it. The Declaration of Paris was drawn up in the interests of neutrals rather than belligerents, and a full discussion of it belongs properly to that portion of our subject which treats of the Law of Neutrality. It will be found there under its proper heads.<sup>1</sup> Meanwhile we may venture upon the assertion that for all practical purposes the old rule no longer applies, and that in ordinary cases, uncomplicated by questions of blockade, contraband

<sup>1</sup> See §§ 265-267.



or unneutral service, a naval belligerent cannot capture the sea-borne goods of an enemy unless they are carried in an enemy vessel.

We have already discussed the circumstances under which the enemy character is acquired by property, and the extent to which, under such circumstances, the enemy taint extends.<sup>1</sup> We have now to state the exceptions to the rule that enemy goods on enemy vessels are lawful prize of war. They are very few and by no means free from doubt. In 1812 the British Vice-Admiralty Court of Halifax, Nova Scotia, restored to the Academy of Arts in Philadelphia a cargo of paintings and prints captured in their voyage from Italy to the United States, on the ground that the arts and sciences were the property of mankind at large, and that the practice of all civilized countries was in favor of their exemption from the operations of warfare.<sup>2</sup> Both the history and the theory of this judgment are open to criticism, but the decision at which it arrives has been approved by many authorities, and would probably be followed by a Prize Court to-day. It is quite possible to hold that articles which give pleasure and instruction to innocent people, and can have no possible effect upon the fortunes of war, should be allowed to pass freely into an enemy's country, without assenting to debatable propositions about communism in art or abstinence from spoliation in warfare. Hospital stores are another kind of goods which we may expect to see exempted in some measure, if not entirely, from capture in future maritime struggles. In all probability they will not be confiscated by a belligerent unless he is in need of such supplies himself, and has no other means of obtaining them.

### § 208.

Sometimes when a vessel is captured the master gives to the captors a document called a Ransom Bill, by which he

<sup>1</sup> See §§ 179-183.

<sup>2</sup> Stewart, *Vice-Admiralty Reports*, p. 482.

promises that they shall within a given time receive a certain sum, and is allowed in return to take his ship to a port of his own country by a prescribed course and within a fixed time. This practice is recognized by International Law, which exempts the ship from capture till it has completed its voyage in fulfilment of the conditions laid down. It is protected by a copy of the Ransom Bill, which is retained by the master and has the effect of a safe-conduct. But the protection vanishes if the vessel deviates from the prescribed course or exceeds the stipulated time without urgent necessity. She is then liable to capture by any ship of the enemy or his allies, and should she be taken a second time the first captor obtains the ransom money from the proceeds of her sale after condemnation, while the second has to be content with the balance. The capture of her captors by a cruiser of her own state or its allies has the effect of nullifying the contract of ransom, provided that the Ransom Bill and the hostage who is usually taken as collateral security are on board at the time. The courts of most states look upon Ransom Bills as contracts of necessity and allow the captor, though an enemy, to sue directly for the sum agreed upon, if the owners of the ship and cargo decline to pay it. But Great Britain holds so strictly to the rule that enemy subjects have no *locus standi* in each other's courts during the war that she will not permit such procedure. The difficulty was, however, surmounted by allowing the British hostage to bring an action in British courts for the recovery of his liberty, which could, of course, be obtained only by the payment of the promised sum.<sup>1</sup>

It is clear on the face of the matter that the practice of ransom involves a surrender of a portion of the possible proceeds of a capture in return for the certainty of a pecuniary gain to the captors. It is therefore objectionable from the point of view of each of the belligerents. One does not

<sup>1</sup> Halleck, *International Law*, Ch. XXIX., §§ 20-26.

The practice of giving and accepting Ransom Bills.

obtain the benefit of his full rights against his foe and the other is condemned to a certain loss, whereas the chances of recapture might turn out favorably, or the Prize Courts might pronounce against the validity of the capture. Moreover, the moral objections to the system are not without weight. It tends to foster the idea that the end of war is the enrichment of individuals rather than the redress of the grievances of states, and it encourages a traffic in what can be justified only as a means of reducing the resources of the enemy. Great Britain has prohibited the practice for more than a hundred years. By her present law<sup>1</sup> the Crown has power by Order in Council to make what regulations it pleases upon the matter; and as no order permitting ransom has been issued, the officers of her royal navy are forbidden to accept it<sup>2</sup> and the masters of her merchantmen to give it. Her example has been followed by the Baltic powers; but France has placed no restrictions upon her navy, and the United States puts no obstacle in the way of her officers and citizens who may wish to make a profit by contracts of ransom.<sup>3</sup>

### § 209.

When property captured by the enemy is recaptured at sea or in harbor, it is generally restored to the original owners by what is called, on the analogy of those rules of Roman Law which gave back to persons and things their original position on their rescue from the power of the enemy, *jus postliminii* or postliminy.<sup>4</sup> During the formative period of modern International Law there was some doubt as to the application of this principle. The *Consolato del Mare* is the only mediæval maritime code which mentions restoration after recapture, and its references

Recapture at sea  
and the *jus post-*  
*liminii*.

<sup>1</sup> *The Naval Prize Act*, 27 and 28 Victoria, c. 25.

<sup>2</sup> Holland, *Manual of Naval Prize Law*, p. 79.

<sup>3</sup> Hall, *International Law*, § 151, note.

<sup>4</sup> Justinian, *Digest*, XLIX., xv.

to the subject are obscurely worded.<sup>1</sup> Grotius hardly ventures to decide whether ships can claim the benefit of postliminy.<sup>2</sup> The first clear and undoubted instance of its extension to them as a matter of state policy occurred in 1584, when the French Government directed that vessels recaptured within twenty-four hours of their capture by the enemy should be restored to their original owners.<sup>3</sup> The British in 1649 adopted a rule practically identical with their present usage, and the Dutch in 1666 ordered restitution if the recapture was effected before the vessel had been sold by the captors and sent on a fresh voyage.<sup>4</sup> Other states soon followed this example, and the practice of restoration became general. There is, however, one exception to its generality. If the recaptured vessel was duly set forth as a ship-of-war by the enemy's authorities, while they had it under their control, it is not given back to the original owners, but becomes the prize of the recaptors. It is now an undoubted rule of International Law as between neutral and belligerent powers that, when one party to the war has captured a neutral vessel and the other has taken her out of his adversary's hands, she must be restored to the neutral owners without salvage if the original capture was effected under such circumstances that it may be presumed no Prize Court would have decreed condemnation, but if confiscation was practically certain a reasonable salvage must be paid. The Court in deciding upon its amount would probably act upon the principle of reciprocity, and, failing that, would apply the rules of recapture as between subjects of its own state. Allies in a war apply to each other the law of the claimant's country at the time of the recapture, and if one of them resorts to a less liberal rule, the others treat his subjects as he treats theirs. But in the vast majority of recaptures the

<sup>1</sup> Phillimore, *Commentaries*, Pt. X., Ch. vi., § 409.

<sup>2</sup> *De Jure Belli ac Pacis*, III., ix., xiv.-xviii.

<sup>3</sup> Robinson, *Collectanea Maritima*, 116.

<sup>4</sup> Bynkershoek, *Questiones Juris Publici*, Bk. I., Ch. 4.

recovered property is owned by subjects of the state whose cruisers have rescued it from the enemy. In such cases the conditions of restoration, and the amount to be paid to the recaptors as salvage, are determined by the law of the country to which all the parties belong; and a great diversity of rules is the result. By an Act of Congress of 1800 the United States have granted restoration of the property to the original owners, if the recapture is effected before condemnation of the ship in a regularly constituted Prize Court of the enemy, and have secured for the recaptors a salvage of one-eighth of the value of the property they retake. France restores on payment of a thirtieth as salvage if the recapture was effected within twenty-four hours of the original seizure, but if a longer time has elapsed a salvage of one-third is given. The English rule is the most liberal of any. It is embodied in the Naval Prize Act of 1864, but has been the same in essentials for the last two hundred and fifty years. It provides for restitution if the recapture is effected at any time during the war that witnessed the capture, and decrees a normal salvage of one-eighth, which may be increased to a fourth if the service has been one of special difficulty and danger. Several states have adopted the British usage; but there is very little uniformity in the matter, the different treatment accorded to different countries in consequence of treaty stipulations, and divergent views as to the exact moment when a good title is obtained by an enemy captor, causing numerous variations in practice. In the days when privateering flourished those who engaged in it generally received more salvage than the regular officers and crews of the state's navy; and at the present time the law of most maritime nations grants a larger share than usual of the rescued property when it is recaptured from pirates. But if the crew of a captured ship rise upon their captors and retake the vessel, they cannot substantiate a claim to salvage; for it is held that their action is no more than a continuation of that resistance to the enemy's force which

it is their duty to offer whenever there is a chance of success. If however any members of the crew or passengers are not subjects of the state whose flag the vessel carries and do not belong to a country allied with it in the war, salvage is due to them because they were in no way bound to assist in the rescue, and consequently their aid deserves a substantial recompense. This doctrine was laid down by Lord Stowell in the case of the *Two Friends*,<sup>1</sup> an American vessel which had been taken by the French in the course of the hostilities between the United States and France in 1799. She was recaptured by the crew with the assistance of a few British seamen who were working their passage to London in her, and the Court decided in favor of their claim to remuneration. A land force may share salvage if the recaptures were due to operations carried on by it and a naval force acting together. It may even obtain salvage when acting alone, in a case where the result of its military operations against an enemy's port is to cause the surrender of the place with vessels taken by the enemy from its compatriots lying in the harbor.

### § 210.

We have discussed the rights of capture possessed by belligerents as far as it is possible to do so without introducing questions connected with neutrality. But in order that belligerents may be able to exercise these rights, it is necessary that they should possess what we may call the ancillary right to stop, detain and overhaul merchantmen, in order to discover whether the ships themselves or the goods they carry are liable to seizure and detention. This is called indifferently the Right of Search or the Right of Visit and Search. Apart from treaty, there is no Right of Visit without a right to examine the papers of the ship visited, and rummage among its cargo if they are not satis-

The Right of  
Search.

<sup>1</sup> Robinson, *Admiralty Reports*, I., 271.

factory, and no Right of Search without a right to detain the vessel searched if a thorough examination of it reveals circumstances of grave suspicion.

All jurists agree that the Right of Search belongs by the common law of nations to belligerents, and to belligerents only. It is, as Judge Story said in the case of the *Marianna Flora*,<sup>1</sup> "allowed by the general consent of nations in time of war and limited to those occasions"; and his statement may be regarded as universally true, since the abandonment by Great Britain in 1858 of her claim to a Right of Visit in time of peace, in order to discover the real nationality of vessels suspected of being engaged in the slave trade. The exceptions introduced by convention are themselves proof that without special agreement no search can take place except as an incident of warfare.<sup>2</sup> It is equally true that the right does not extend to public vessels. It can be exercised upon merchantmen only. They are bound to submit to search from a lawfully commissioned belligerent cruiser. Resistance to it will bring down certain capture and condemnation upon a ship or cargo otherwise innocent. An enemy merchantman may fight when attacked, but unless it can succeed in beating off the foe its resistance will put it in a worse position than before. A neutral merchantman violates International Law if it makes an attempt to repel belligerent search by force of arms. Success might save it for the moment, but not for long. An international question would be raised between its country and the injured belligerent; and, unless its government wished to provoke complications, some kind of punishment would fall upon it for its unlawful proceeding. But though neutral ships of commerce must submit to belligerent search, neutral men-of-war are free from it. Any attempt to enforce it against them would be a gross outrage. Even at the beginning of the present century the British Government disavowed the act of Admiral Berkeley in ordering the vessels of his squad-

<sup>1</sup> Wheaton, *Reports of the Supreme Court*, XL, 1.

<sup>2</sup> See § 124.

ron to search the American ship-of-war *Chesapeake* for deserters from the royal navy. In consequence of this order a conflict took place between the *Chesapeake* and the *Leopard*, and after the surrender of the former four seamen were taken out of her. These unjustifiable and high-handed proceedings nearly led to a war between the two countries in 1807. It was averted at the time by the disavowal of the British Government, and its tender of indemnity to those American citizens who were injured in the action and the families of those who were slain; but unfortunately the dispute as to the right of impressment still went on, and became the chief cause of the War of 1812.<sup>1</sup> The search of a neutral public vessel by a belligerent cruiser was an outrage in the first decade of the nineteenth century. It is a moral impossibility to-day.

A belligerent vessel may chase under false colors or without colors of any kind; but before it commences the actual work of visit and search it must hoist its country's flag. If hailing is impossible, or if the suspected vessel takes no notice of it, the chasing cruiser may signal her to bring to by using blank cartridge, and then, if necessary, sending a shot across her bows. This is called firing the *semonce* or affirming gun. Any other signal likely to be understood is equally lawful, but some unmistakable summons is necessary. Not till it has been given and disregarded is the use of force allowed. Into the incidents of a conflict we need not go. They have nothing in common with the procedure of a search. Assuming that the summons of the belligerent cruiser is obeyed, the next step taken by her commander is to send an officer in uniform on board the vessel to be searched. The visiting officer should question the master of the vessel and examine her papers. If any circumstances of suspicion are revealed by his examination, but not otherwise, he is at liberty to call his boat's crew on board and order them to make a thorough search of the vessel. Should

<sup>1</sup> Wharton, *International Law of the United States*, §§ 315 b, 331.



the search confirm the suspicions, the commander of the cruiser may take possession of the ship, secure her papers and hold her master and crew as prisoners. But throughout his proceedings he is bound to use courtesy and consideration, and to carry on the search with as little disturbance as possible of the interior economy or navigation of the suspected vessel. The regular course is to send her to the most accessible Prize Court of his own state for adjudication. If the grounds on which the capture was effected turn out to be good, condemnation will ensue, and the captors will receive the proceeds of the sale of the captured property in the form of prize money. If the evidence against the vessel is not conclusive in spite of circumstances of just and reasonable suspicion, she will be released, but her owners will have to bear the expense of detention and delay. But if the capture was effected on frivolous and foolish grounds, the officer responsible for it will be condemned in costs and damages. And the same rule holds good in the more difficult matter of the treatment of vessels suspected of piracy by the cruisers of non-belligerent powers. Being at peace they have no right to search unless the ship they have in view is really a pirate, in which case they are free to go further and capture. But they cannot tell whether the right to seize the vessel exists until they have visited and overhauled her. They must, therefore, be guided by surrounding circumstances. Should the information they have received and the behavior of the vessel when approached give rise to reasonable suspicion that she is a pirate, their commanders are not liable to damages for seizing her, even if it should turn out that her errand was perfectly lawful. But if they have made an inexcusable mistake they must suffer for it. On the other hand, should the vessel be really a pirate, their action is lawful from the beginning and they have performed a meritorious service.<sup>1</sup>

<sup>1</sup> See case of the *Marianna Flora* in Wheaton, *Reports of the Supreme Court*, XI., 1.

The procedure we have just sketched gives all reasonable security to neutrals against vexatious and unnecessary interference with their vessels and cargoes; but many European writers, in their zeal against belligerent search, have endeavored to surround it with further limitations. They sometimes state as undoubted law rules that are purely theoretical. Hautefeuille, for instance, declares that the searching officer must in no case go beyond an examination of the ship's papers,<sup>1</sup> and Ortolan allows further steps to be taken only when there is a suspicion of fraud about the papers.<sup>2</sup> Rules like these can be embodied in special conventions by states who wish their ships-of-war to be hampered by them, but they are unknown to the ordinary law of nations, and therefore not binding in the absence of treaty stipulations. Nor can it be said that they would form a desirable addition to the *corpus* of International Law. We shall see almost immediately that further restrictions upon the present wide right of capturing private property at sea are eminently desirable; but unless maritime warfare is to be made absolutely ineffective for the purpose of weakening an enemy's resources, belligerents must retain the power of seizing contraband goods conveyed in neutral vessels. And as long as capture exists, the means of effecting it must exist also. To deprive search of efficiency is to reduce capture to an expensive farce. No doubt the right of search is exceedingly troublesome to neutrals. It causes their merchantmen much annoyance and some loss, even when they have not rendered themselves liable to detention and condemnation, and naturally their governments endeavor to minimize it. The most persistent move in this direction has been an attempt on the part of several states to secure freedom from belligerent search for neutral ships of commerce sailing under the escort of a ship of war of their own nationality. We shall consider it under the head of Convoy when we deal

<sup>1</sup> *Droits des Nations Neutres*, Tit. IX., Ch. i

<sup>2</sup> *Diplomatie de la Mer*, Liv. III., Ch. vii.

with the Law of Neutrality.<sup>1</sup> Here it is sufficient to say that little good can be done by depriving the operations of warfare of efficiency while still allowing them to remain in use.

### § 211.

We have had occasion in the preceding paragraphs to mention a ship's papers on several occasions, but we have not yet explained what is meant by the phrase, and it will be convenient to do so now. International <sup>Ships' papers.</sup>

Law requires every merchantman to carry certain documents, as evidence of her nationality and proof of the real nature and destination of her cargo. She should also have on board a record of her course, written evidence of the ownership of both vessel and cargo, a muster-roll of her crew, and full statements as to any contract concerning the letting and hiring of the vessel and the obligations undertaken by the master with respect to the delivery of the goods under his charge. The exact form and number of these papers differ according to the law of the various maritime countries, but they must always be sufficient to fix the nationality of the ship, her destination, and the ownership of vessel and cargo.

A list of the papers required by the law of each civilized state will be found in Manuals of Prize Law issued by the naval authorities of the chief maritime nations and in some of the large works on International Law.<sup>2</sup> The absence of papers will justify detention by a belligerent cruiser, as will also the presence of false papers, or gross irregularities, omissions, or inconsistencies in the papers produced. What is technically called spoliation of papers has given rise to a difference of treatment among the Prize Courts of the leading naval powers. The phrase signifies the wilful destruction of documents by throwing them overboard during a chase, or by any other means. The British and American practice is to regard it as good ground for the capture of

<sup>1</sup> See § 268.

<sup>2</sup> e.g. Hall, *International Law*, Appendix II.

the vessel, but not necessarily good ground for condemnation. It affords a strong presumption of her guilt, but not a presumption which cannot be rebutted by evidence to the contrary. On the other hand, most European nations hold that it is absolutely conclusive against the ship, and exclude further proof.<sup>1</sup>

### § 212.

As between belligerents superior force is its own justification. If enemy property is captured at sea under circumstances that render it liable to hostile seizure and detention by the laws of war, the rights of the original owners are destroyed, though, as we have recently seen, they may be revived by the *jus postliminii* in cases of recapture. But sometimes it is doubtful whether certain property really belongs to an enemy owner, or whether the capture was effected in a place where warlike operations may be carried on; and it is always necessary to determine the exact extent of the proprietary rights accruing to the individual captors. It follows, therefore, that the intervention of a court is highly desirable, even in cases where belligerent property, or what is believed to be such, is the only subject-matter concerned. But desirability becomes necessity when neutral rights and neutral claims are involved. Force cannot control the relations of states at war with the subjects of powers which take no part in the contest. They may be condemned to lose their property under certain circumstances, but the mere fact that a belligerent has succeeded in obtaining and keeping possession of it does not give him a right to it. The question whether he has such a right or not is a question of law to be settled by judicial proceedings. Accordingly, all civilized belligerents establish Prize Courts for the protection of neutral subjects and the proper adjustment of the claims of captors. When the servants of a state seize enemy prop-

The nature of Prize Courts and the responsibility of the state for their decisions.

stances that render it liable to hostile seizure and detention by the laws of war, the rights of the original owners are destroyed, though,

<sup>1</sup> Halleck, *International Law*, Ch. xxvii., § 27.

erty at sea, in strictness of law they seize it for their country, and not for themselves; but, as in the similar case of booty on land, the law of every civilized nation gives the whole or a portion of the captured movables to the captors according to some scale of reward fixed by public authority. In the United States Congress has power to make rules concerning captures at sea, and it exercised this power in 1864 by passing an act which gave the whole of the value to the captors when the vessel or vessels making the capture were of equal or inferior force to the prize; but if their force was superior, they were to receive a half only, the rest going to the Treasury. In the same year the British Parliament legislated on the subject in the Naval Prize Act, which expressly declares that captors "shall continue to take only the interest (if any) in the proceeds of prizes as may be from time to time granted to them by the Crown." But it is and has been the invariable rule of the Crown in modern times to surrender the entire proceeds to the officers and men engaged in the capture. The general practice of Prize Courts is to order a sale of the vessel or goods on condemnation; and the sum thus realized is divided among the captors.

Prize Courts are municipal tribunals set up by belligerent states in their own territory, in territory under their military occupation, or in territory belonging to an ally in the war. In the last case the permission of the ally must be obtained beforehand. But a neutral cannot allow the establishment of a belligerent Prize Court in its territory without a grave breach of the duties prescribed by neutrality; and if one of the parties to the war attempts to set up such courts within the area of neutral jurisdiction, he commits a gross outrage upon the Right of Independence by his endeavor to exercise powers of sovereignty of the highest kind in the dominions of a friendly and peaceful nation. It is very improbable that anything of the kind will be attempted in future. But should such an aggression take place, the state

which suffers from it may resent it by war, if diplomatic pressure fails to obtain redress. Submission on the part of the neutral government would bring upon it reclamations and possibly hostilities from the belligerent which suffered through its subservience. This was clearly seen by Washington when, in 1793, Genet, the Minister of the French Republic, endeavored to set up Consular Prize Courts within the territory of the United States.<sup>1</sup> After a period of unavailing remonstrances addressed to him personally, his recall was demanded from his government, who complied with the request, and caused the discontinuance of the obnoxious proceedings.

Though Prize Courts are set up by the authority of a belligerent government, and their judges are appointed and paid by it, they exist for the purpose of administering International Law. In America, court after court has decided that International Law is part and parcel of the law of the land;<sup>2</sup> and it is held that every member of the family of nations must submit to the rules of the society of which it forms a part. In England this view has not been so clearly expressed or so widely adopted.<sup>3</sup> But it is nevertheless the dominant opinion, and on the continent of Europe it would meet with general acceptance, though it would hardly be stated in the terms we have used. All nations would, however, agree in holding that their Prize Courts were bound to apply the rules of the law of nations to the cases which came before them for settlement; and in the vast majority of cases practice on this point coincides with theory. While human nature remains what it is, the most upright and able of judges will find it impossible to divest themselves altogether of influences due to national predilections or professional training. But it is possible to reduce these disturbing elements to a minimum, and the great lights of

<sup>1</sup> *Special Message of Dec. 5, 1793.*

<sup>2</sup> Wharton, *International Law of the United States*, § 8.

<sup>3</sup> Maine, *International Law*, Lect. II.

international jurisprudence who have adorned the judicial bench have been as conspicuous for impartiality as for learning. There is, however, one case where the most upright of judges may be compelled to give a decision which he knows to be contrary to the received principles and rules of the international code. It occurs when the government of his own country, through its appropriate department, issues for the guidance of its cruisers instructions which order them to make captures of enemy or neutral vessels, under circumstances deemed innocent by the law of nations as generally understood and acted upon. Such were the Berlin and Milan Decrees of the first Napoleon and the retaliatory British Orders in Council. The naval officers of each country were, of course, obliged to obey the orders issued to them by their superiors, and the courts were equally bound to notice and administer the rules laid down by legislative authority. If they had refused they would have been in a state of contumacy, and their judges would have been quickly dismissed. Wharton quotes an article in the *Edinburgh Review* of February, 1812, in which scorn is poured on the theory that French Courts of Prize are "bound by the decrees of the Tuileries" or English by the edicts of Windsor,<sup>1</sup> and Halleck asserts that "local ordinances and municipal regulations . . . are not binding on the Prize Courts, even of the country by which they are issued."<sup>2</sup> This doctrine has found adherents in other quarters, but in truth it is simply anarchical. It implies that naval officers ought to disobey orders and judges refuse to administer laws imposed by proper legislative authority. It arises from a confusion between wrongful action on the part of the state and wrongful action on the part of its agents. Soldiers, sailors, civil servants, judges — in short, all subordinate authorities — must obey the orders of the supreme power, except in those rare cases in which resistance and revolution are justifiable.

<sup>1</sup> *International Law of the United States*, § 829 a.

<sup>2</sup> *International Law*, Ch. xxxii., § 19.

But the state itself is responsible to other states for any injury done to them or their subjects by proceedings in excess of its lawful powers as a belligerent. Its Prize Courts, if left to themselves, as they ought to be and generally are, will administer International Law; but if legislation contrary to International Law is thrust upon them, they must obey it. Other states, however, are in no way bound to submit; and if neutrals think themselves aggrieved because of decisions arrived at, either spontaneously or in consequence of legislative acts, they will complain to the belligerent government. The effect of a decision in a Prize Court is to settle all proprietary rights in the vessel or goods under adjudication. Controversy between the captors and the claimants is terminated by the final judgment on appeal, and a court of another country cannot afterwards review the decision. But compensation for damage suffered in consequence of it may be demanded on behalf of neutral sufferers by their own government. A state is responsible for the decisions of its Prize Courts; and if they have acted unjustly, it is its duty to give satisfaction. Many instances where this has been done may be found in the history of international relations. We may give, as an example, the award of the Mixed Commission, appointed under the Treaty of 1794 between Great Britain and the United States. It granted an indemnity in respect of several cases in which the British Prize Courts, by a stretch of the extremest rights of a belligerent, had condemned American vessels laden with provisions for French ports.<sup>1</sup>

### § 218.

The jurisdiction of Prize Courts extends over all captures made in war by their country's cruisers, over all captures made on land by a naval force acting alone or in conjunction with military forces, and over seizures made afloat in anticipation of war. It also includes

The jurisdiction  
of Prize Courts.

<sup>1</sup> *Treaties of the United States*, 384, 385, 1322-1324.



all recaptures, ransoms and ransom bills, and all incidental questions growing out of the circumstances of capture such as freights and damages. Speaking generally, we may lay down the proposition that the courts of neutrals have no jurisdiction over the captures of belligerents. But to this rule there are exceptions. Jurisdiction exists and can be exercised when the capture is made within the territorial limits of the neutral state, or when a vessel, originally equipped for war within neutral jurisdiction, or afterwards made more efficient by an augmentation of warlike force therein, takes a prize at sea and brings it within the waters of the injured neutral during the voyage in which the illegal equipment or augmentation took place. In both cases neutral sovereignty is violated by one belligerent, and in consequence the neutral is exposed to claims and remonstrances from the other. Jurisdiction is therefore conferred upon it for its own protection, and in order that it may insist upon the restoration of the property unlawfully taken. We shall see more fully the bearing of these principles when we deal with the rights and duties of neutral states in relation to the naval operations of the belligerents.<sup>1</sup>

### § 214.

There is little in common between an ordinary trial and a suit in a Court of Prize. In the former an issue between two parties is tried. In the latter the state holds what, following Dana,<sup>2</sup> we may call an The procedure of Prize Courts. inquest upon certain property to discover whether it has been lawfully captured or not, just as in England the coroner holds an inquest upon a body to discover whether the individual concerned came by his death lawfully or not. Proceedings commence when the captured vessel has been brought into port within the jurisdiction of a Prize Court by an officer of the vessel which made the seizure. He puts

<sup>1</sup> See § 204.

<sup>2</sup> Note 186 to Wheaton's *International Law*.

in a libel, that is to say, he petitions the court to hold an inquiry, and with his libel or petition he forwards the necessary affidavits, the ship's papers and other documents. Notice is then given that any person having an interest in the property may appear and claim it, or any part of it. An enemy cannot come forward, but citizens, allies or neutrals may. As the next step, whether claimants appear or not, the court by its own officers examines the captured vessel, its papers and cargo, and administers interrogatories to the persons found on board. The captors are not examined at this stage, nor are they allowed to examine the claimants or the captured persons. When the court has taken the evidence, counsel for the interested parties inspect it and base their arguments upon it. The burden of proof lies on the claimants, the fact that the vessel was brought in under the control of the captors giving rise to a presumption in their favor. If the evidence above described, which is technically termed evidence in preparatory, is deemed satisfactory by the court, it gives its decision. If not, it calls for what is termed further proof. The proceedings then take more closely the form of a trial between litigants. The captors and the claimants produce evidence, and the court gives judgment accordingly.<sup>1</sup>

### § 215.

In our account of prize proceedings we have assumed throughout that the vessel has been brought into port and delivered over to the custody of the court. Undoubtedly this is the proper course, for the proceedings are proceedings *in rem* and the vessel herself, with her papers and crew, are the best evidence that can be submitted to the judge. But though this course is regular, it is not essential. Property may be

The obligation of captors to send their prizes in for adjudication.

<sup>1</sup> Wheaton, *International Law* (Dana's ed.), 480-483, note; Holland, *Manual of Naval Prize Law*, Ch. xxii.; *Naval Prize Act of 1864*, §§ 16-33.

adjudicated upon when it lies in the port of an ally in the war, or in a foreign port under military occupation by the captor's country, or even in the port of a neutral. It is open to neutral sovereigns to admit the prizes of belligerent cruisers into their harbors. The prevailing tendency in modern times has been to exclude them; but it is impossible to say that a breach of International Law is committed when they are allowed to enter, provided that the permission be granted impartially to both sides. And if, in consequence of such a grant, prizes lie in neutral waters, the courts of the leading maritime powers will adjudicate upon them. Sometimes a captor sells his prize before condemnation. Grave necessity will, it is said, excuse such an act; but prize proceedings for adjudication on the proceeds of the sale ought to be commenced without delay. The irregularity, however, would be so exceedingly grave that we may well doubt whether it would now be countenanced. Should the capture turn out to be illegal, neutral owners would have good ground of complaint when the proceeds of a forced sale were handed over to them instead of the ship itself. And their complaints would have still greater justification if a belligerent destroyed at sea any prizes taken from neutrals. This question has given rise to much discussion in recent years. Hall gives an excellent summary of the views expressed by various authorities, and accompanies it by many acute remarks of his own.<sup>1</sup> It appears to be generally conceded that when the captured ship and cargo is enemy property there is no good ground for complaining of her destruction, provided that her crippled condition rendered navigation difficult, or the contiguity of an enemy or any other cause made it unsafe to detach a prize crew. The doctrine that necessity justifies departure from the regular practice has been laid down in British and French Prize Courts. In 1812 the United States went further, and instructed their naval officers at the outbreak of the war with

<sup>1</sup> *International Law*, § 150 and notes.

England to destroy all the enemy merchantmen they took, unless they were "very valuable and near a friendly port."<sup>1</sup> The exception was here turned into the rule and the rule into the exception. It was perhaps a natural recoil from this extreme severity which caused Woolsey to characterize the practice of destruction as "barbarous" and say that it "ought to disappear from the history of nations."<sup>2</sup> Unfortunately, there appears to be more chance of its extension. The Confederates burnt or sank their prizes during the great American Civil War, on the ground that the strict blockade of their ports by Northern squadrons rendered it impossible to take vessels in for adjudication. In 1870 the French burned two German vessels in spite of the fact that they had neutral goods on board. The Russians in 1877 destroyed some of their prizes in the Black Sea, because the Turkish blockade of their ports made access to them difficult; and in the various pamphlets and articles in which continental fear and jealousy of England's maritime greatness gloat over a pictured downfall of her naval power, the attack which is fatal to her commerce is always carried on by cruisers who do not encumber themselves with captured British vessels.<sup>3</sup> It may be that the older rule will give way under the impact of new conditions. The chance of rapidly sweeping an enemy's mercantile marine from the seas may prove to be more attractive than the chance of prize-money. But we may venture to hope that the minds of the naval officers of the future will not be perplexed by the task of choosing between the two alternatives; for if the capture of private property at sea were banished from warfare, the difficulty could not arise. Meanwhile it is necessary to point out that a broad line of distinction must be drawn between the destruction of enemy property and the destruction of neutral property. The former has changed

<sup>1</sup> Quoted by Sir A. Cockburn in his *Reasons for dissenting from the Award of the Tribunal of Arbitration*, p. 93.

<sup>2</sup> *International Law*, § 148.

<sup>3</sup> e.g. *Russia's Hope*.

owners directly the capture is effected; and it matters little to the enemy subject who has lost it whether it goes to the bottom of the sea or is divided by public authority among those who have deprived him of it. But the latter does not belong to the captors till a properly constituted court has decided that their seizure of it was good in International Law; and its owners have a right to insist that an adjudication upon their claim shall precede any further dealings with it. If this right of theirs is disregarded, a claim for satisfaction and indemnity may be put in by their government. It is far better for a naval officer to release a ship or goods as to which he is doubtful, than to risk personal punishment and international complications by destroying innocent neutral property. Even where what is believed to be enemy property is concerned, and destruction or release become the only possible alternatives, it would perhaps be wise to adopt the latter unless the hostile nationality of the vessel and ownership of the cargo are too clearly established to admit of mistake. But the necessity of rapid movement in modern naval warfare, combined with the fact that neutral ports will in most cases be closed to prizes, is almost certain to result in an increase of the practice of destruction, unless the nations will consent to take a further step forward, and prohibit the capture of private property unless it be contraband of war.

### § 216.

From time immemorial the laws of war have allowed the capture of private property at sea. But within the last hundred years a strong dislike of the practice has sprung up in America and on the continent of Europe. The United States has favored the policy of exemption from the beginning of its national career. It was embodied in Franklin's treaty with Prussia in 1785,<sup>1</sup> but found no place in the subsequent treaties with

History of the proposal to exempt private property from capture at sea.

<sup>1</sup> *Treaties of the United States*, 905, 906.

that power. In 1823 Mr. John Quincy Adams, as Secretary of State, proposed to the governments of England, France and Russia that they should enter into a convention for the purpose of exempting private property at sea from the depredations of war, an exemption which he seems curiously enough to have regarded as equivalent to "the total abolition of private maritime war."<sup>1</sup> England and France declined to entertain the proposal, and, as Russia made her acceptance conditional on that of the other naval powers, nothing came of the effort to engraft it upon the international code. In 1856 another attempt was made by the American Government to obtain a general recognition of the principle of exemption. The powers assembled in Congress at Paris had drawn up and signed a Declaration on Maritime Law, the first article of which decreed the abolition of privateering.<sup>2</sup> When this important document was submitted to the United States for signature, President Pierce and his Cabinet declined to give up for their country the right to employ privateers, unless all private property at sea, except contraband of war, was freed from liability to capture. Some of the leading states of Europe, notably Russia and Prussia, were willing to consent to this enlargement of the scope of the original Declaration;<sup>3</sup> but the project fell through owing to the opposition of Great Britain. In the correspondence of 1861 on the subject of the Declaration, Mr. Seward, then Secretary of State, expressed a wish that it might be accepted; and when, in 1870, the Prussian Government notified that it would not capture private property at sea during the war which had just broken out with France, Mr. Fish, in acknowledging the receipt of the declaration in favor of exemption, gave utterance to the hope that "the government and people of the United States may soon be gratified by seeing it universally recognized as another restraining and har-

<sup>1</sup> Wharton, *International Law of the United States*, III., 261.

<sup>2</sup> See §§ 223, 267.

<sup>3</sup> Wheaton, *International Law* (Lawrence's ed., 1864), pp. 640, 641.

monizing influence imposed by modern civilization upon the art of war.”<sup>1</sup> In the following year he was able to do something towards the realization of his own wish by negotiating a treaty with Italy, which provided that in the event of war between the two powers, private property of the citizens and subjects of each should be exempt from seizure at sea, unless it were contraband of war.<sup>2</sup>

The facts just narrated bring two points into prominence. It is quite clear that the United States are in favor of exemption as a fixed and settled policy, and it is equally clear that they do not regard it as part of the public law of the civilized world. It is something to be desired and worked for, not something which has been already obtained. On the continent of Europe a preponderance of opinion in favor of the change exists among jurists, and probably among statesmen also, though it may well be doubted whether the balance of naval authority inclines towards it. But the fact that the conflict of 1866 between Prussia and Italy on the one side and Austria on the other was fought from beginning to end without resort to the capture of private property is most significant. When a new view of international duty has stood the test of a great war, it can no longer be regarded as purely academic in its nature; and the influence of the particular view now under consideration has not been confined to one war. It made itself felt in Article 211 of the Italian Maritime Code, which forbids Italian ships of war to molest the merchant vessels of any enemy who refrains from capturing the private property of Italian subjects in his naval operations; and its strength was further manifested in the Commercial Treaty of 1871 between the United States and Italy, whereby, as we have already seen, the two countries agreed to grant exemption, on the footing of reciprocal concession. There seemed at one time every prospect of freedom from molestation for peaceful commerce in the great war of

<sup>1</sup> Wharton, *International Law of the United States*, III., 296.

<sup>2</sup> *Treaties of the United States*, p. 584.

1870-71 between France and Germany. Prince Bismarck declared at its commencement that private property on the high seas would be exempt from seizure by the ships of the King of Prussia without regard to reciprocity. But in January, 1871, the concession was withdrawn, because France acted upon her full rights as a belligerent, and made prizes of German merchantmen. Clearly this last instance does not give much help to the contention that the new ideas are gaining ground. It cannot, however, be denied, that they have in some cases influenced practice; and when once the besieging forces of theory have gained a footing within the citadel of action, they have a habit of carrying it entirely after a more or less stubborn conflict with its defenders.

If we turn from the deeds of rulers and commanders to the opinions of jurists, we shall find a vast preponderance of authority in favor of the proposed change. During the last century the voices raised in its favor were few and far between. Franklin in America, Mably and Galiani in Europe, were its chief advocates. But now the chorus of its supporters is so loud and strong that there is some difficulty in hearing the answers of those who still defend the ancient practice. Bluntschli, De Martens, Bernard, De Laveleye, Calvo, Hall, and many others now living or but recently removed by death, have championed the new view. The Institute of International Law has twice pronounced in its favor,<sup>1</sup> and there are no signs of a reaction in the works of the younger generation of modern publicists. Why then, it may be asked, has it not been adopted by the maritime powers, and made into a rule of International Law with the necessary exceptions and qualifications? These may be found duly set forth in the Maritime Code adopted after long deliberation by the Institute of International Law at its session at Heidelberg in 1887.<sup>2</sup> The statesmen have nothing to do but to accept the conclusions of the jurists

<sup>1</sup> *Tableau Général de L'Institut de Droit International*, pp. 191, 196.

<sup>2</sup> *Ibid.*, pp. 196, 199, 200.



and secure for them the sanction of general consent. But it is just at this point that the difficulty comes in. France is by no means sure that the principle of exemption would work in her interest, and is but half converted to it, as her conduct in 1870 shows. Her naval authorities and those of Russia look upon attacks directed against the sea-borne commerce of England as one of their deadliest weapons in some possible struggle of the future. It is not improbable that their governments might refuse to enter into any international agreement which would deprive them of the right to use it. But Great Britain herself has hitherto been the chief obstacle to the adoption of such an agreement. In her great struggle with revolutionary and Imperial France, she not only destroyed the commerce of her foes, but added a million tons of shipping to her own mercantile marine; and in consequence her rulers and people became fully convinced that it was far more important to her to retain the liberty of striking at her enemy's merchantmen than to secure the safety of her own. It is exceedingly difficult to expel a rooted idea from the mind of a people. Since the fall of Napoleon science has revolutionized both commerce and warfare, and the internal economy of England has undergone a complete change with the increase of her population and her manufactures. She now imports most of the raw material of her industries and about three-quarters of her wheat supplies, besides vast quantities of other goods. War under its present rules would mean the immediate loss of her carrying trade, if her enemy were able to place a few swift cruisers upon the seas. A temporary disaster to her fleet would entail the ruin of many of her manufactures; and a serious blow to her naval power would result in the slow starvation of millions of her people. On the other hand, the destruction of the commerce of any of her possible foes among powers of the first rank would mean for it no more than serious inconvenience. She might drive its merchant flag from the seas, and shut up its men-of-war in their harbors, but

the railways would pour in what it needed over its land frontiers, and it would be able to fight on, though some sections of its population might suffer from the stoppage of its ocean trade. The United Kingdom, however, has no land frontiers, and could not obtain supplies in sufficient quantity if it lost the command of the sea; for one of the peculiarities of its position is that it, and it alone of all the great states of the world, does not only its own carrying trade but also a large part of the carrying trade of other nations. Consequently neutrals would be unable on a sudden emergency to find the ships in which to bring to it the goods it could not import in its own vessels. No doubt it is very unlikely that Great Britain will be deprived of her naval superiority; and it may be argued that, as she came successfully and with increased trade through the only life and death struggle she has been engaged in since she became a manufacturing nation, she would be able to flourish under similar conditions now. But the conditions cannot be similar. They must be utterly dissimilar, as a few figures will show. Early in the nineteenth century Great Britain imported about two pounds of wheat and flour every year for each unit of her population; now, at the end of the century, she imports about four hundred and seventy pounds. When the war with France broke out afresh in 1803, she had in round numbers two million tons of shipping and a foreign trade amounting to £62,000,000 to protect; to-day she and her colonies have more than ten million tons of shipping, and a foreign trade amounting to quite £1,100,000,000. Moreover, ninety years ago she could capture her enemy's goods when found under neutral flags, whereas she has been estopped since 1856 from doing so by her acceptance of the Declaration of Paris.<sup>1</sup> It follows that the commerce of her foes could easily be carried on in non-belligerent vessels, whereas we have just seen that she would be unable on account of her very commercial supremacy to adopt for the

<sup>1</sup> See § 207.

security of her own trade the plan whereby they would shelter theirs from her attacks. Considerations such as these have induced several English writers<sup>1</sup> to advocate the principle of the exemption of private property from capture at sea; but they have not succeeded in converting their government, and at present public opinion is apathetic.

### § 217.

On the whole, it may be said that motives of self-interest have determined the policy adopted by states on this question, whereas publicists have usually argued it on moral grounds. Those who are in favor of the change point to the security from pillage now enjoyed by private property on land, and denounce as barbarous its continued liability to capture at sea. Most of them<sup>2</sup> repeat the declaration of Portalis, which he in turn borrowed from Rousseau, that war is a relation of state to state, not of individual to individual, and, regarding it as axiomatic, have no difficulty in showing that the present state of maritime law is inconsistent with it. They also argue that, as the great naval powers have already accepted the doctrine of Free Ships, Free Goods, the further step of agreeing to complete exemption would be no great matter from the point of view of a powerful belligerent, while it would be a marked gain to humanity. The defenders of the present practice point out that the analogy of land warfare is deceptive. An occupied province can be made to assist the invader by its resources, whereas at sea there is no alternative between capturing private property or letting it go free to strengthen the resources of the enemy. Now that priva-

Arguments for and against the proposed exemption.

<sup>1</sup> e.g. Hall, Article in *Contemporary Review* for October, 1875, and Lawrence, *Essays on some Disputed Questions in Modern International Law*, VII.

<sup>2</sup> e.g. De Laveleye in *Revue de Droit International*, Vol. VII., 560-602, and in *Pall Mall Gazette* of Oct. 10, 1884; Bluntschli in *Revue de Droit International*, Vol. IX., 549-557, and Vol. X., 70-82; Acollas, *Droit de la Guerre*, Chs. i. and xii.

teers have fallen into disuse, the seizure of merchant vessels by the cruisers of a hostile navy far more nearly resembles the levying of a requisition than the indiscriminate plunder which has happily disappeared in theory, and to a large degree in practice, from land warfare. It is further contended that there is no more humane method of reducing an enemy's power to support the burdens of war than the destruction of his sea-borne commerce. The doctrine that war is now confined to the forces of the belligerent states, and affects individuals only in so far as they are agents of the state, is refuted by a simple enumeration of the rights possessed by an invader over the non-combatant inhabitants of the territory under his military occupation; and in answer to the argument that the proposed change would be but a small one, since the right of capturing enemy's goods in neutral ships has been already surrendered, it is pointed out that under present circumstances a state which is able to deliver a successful attack against the mercantile marine of its foe, can at the very least drive enemy merchants to the expensive and burdensome resort of seeking for their cargoes the shelter of neutral flags.

A careful review of the controversy seems to lead to the conclusion that, though the advocates of exemption frequently overstate their case, particularly when they place it on humanitarian grounds, the balance of argument on the whole inclines to their side. The present practice gives direct encouragement to attacks upon defenceless merchant vessels in order to obtain prize-money, and thus tends to foster the idea that war may be waged by honorable men for their own private advantage. It also carries with it the retention as prisoners of war of the crews of the captured ships, though they are as truly non-combatants as the artisans and miners of an occupied province, whom no one dreams of reducing to captivity. It may be admitted that the weakening of an enemy by cutting off his ocean trade, and thus depriving him of his resources for war, is one of

the least objectionable methods of bringing him to terms, seeing that it involves little or no bloodshed, and is free from the moral dangers attendant upon the presence of a victorious soldiery among the families of a territory they have overrun. But the cases in which such a result is possible are so few that they can hardly justify the retention of a severity which will generally exercise an infinitesimal influence upon the issue of the contest. Since the Declaration of Paris in 1856, ordinary belligerent trade has been safe at sea under a neutral flag; and since the introduction of railways a country bordering upon civilized peoples can always obtain what it most needs over its land frontiers at a slightly increased cost, even though the sea is closed to its merchant vessels. Only when a state is wholly surrounded by sea, or when its boundaries march with those of hostile or uncivilized neighbors, will it be in danger of losing the sinews of war owing to the inability of its trading vessels to navigate the ocean in safety. Neither in the Franco-German war of 1870, nor in the Russo-Turkish war of 1877, was the result affected by the capture of private property at sea. In the Austro-Prussian war of 1866 such property was left unmolested; and no one has ventured to assert that Austria would have been able to reverse the issue, or even to prolong the struggle, had the navy which conquered at Lissa been let loose upon Prussian and Italian merchantmen. The only instance in modern times in which successful operations against an enemy's commerce so weakened his resources that he was forced to surrender sooner than would otherwise have happened is found in the great American Civil War. But in that case it was the blockade of the Southern ports, and the consequent exclusion from them of neutral ships, which hastened the collapse of the Confederacy, not the destruction of a mercantile marine flying the Southern flag. While the right to blockade an enemy's coast exists, maritime superiority must tell enormously in any war with a country which cannot draw plentiful supplies

across its land frontiers. But it may be doubted whether the right to capture enemy cargoes only when found in enemy vessels is of much value, except in the very rare cases when the carrying trade of the enemy is a chief source of his strength, or neutral ships are unable to take the place of his own merchantmen. Sea-power is most important in war. No state can maintain a widely extended empire without it. It is effective by cutting off supplies of arms and munitions, conveying troops and stores where they are wanted and keeping the enemy from doing the same, capturing coaling stations and islands, severing the communications with colonies and distant possessions, blockading ports, and destroying vessels of war. Such services as these tell heavily; but in the vast majority of wars little advantage can be gained by driving sea-borne commerce out of hostile and into neutral ships. We have to consider whether it is wise and right to keep up a rule always productive of considerable evil for the sake of the good it may do in a few exceptional instances; and we shall probably decide that the good is too problematical to justify resistance to a change which will at once decrease the sufferings caused by war and purge it still further from the sordid taint of personal enrichment.

## CHAPTER VI.

### THE AGENTS, INSTRUMENTS AND METHODS OF WARFARE.

#### § 218.

THERE is great doubt and much dispute with regard to the lawful use of some of the agents of warfare. Soldiers and sailors of the regular armies and navies of the belligerents, including fully organized militia and reserves, are legitimate combatants.

The disputes as to some of the agents of warfare.

A state may avail itself of their services to the fullest extent; but the legality of other agencies is not so freely conceded. Some may be used in certain circumstances or under certain conditions, but not in other circumstances or under other conditions. Others are forbidden altogether according to one set of authorities, while another set allow them either unconditionally or with various restrictions. The only course to follow in order to attain satisfactory results is to consider each of these difficult cases separately.

#### § 219.

We will take first the much disputed question of whether it is lawful to use

#### *Guerilla Troops,*

and, if so, under what conditions of leadership, organization and armament. They may be described as bands not belonging to a regular army and not under strict military discipline, but nevertheless operating actively in the field and devoting themselves entirely and

Guerilla Troops.

continuously to warlike avocations without intervals of the peaceful pursuits of ordinary life. They often perform valuable services to their own side by attacking convoys of arms and provisions on the way to the enemy, cutting off his communications, blowing up bridges and destroying railways in his rear, intercepting his despatches, and harassing him in the numberless ways that patriotic ingenuity can suggest and superior mobility carry out. Knowledge of the country, coolness and daring are the conditions of success in guerilla warfare. With small means it may inflict irreparable damage upon the side against which it is directed; but those who engage in it are free from many of the restraints of more regular combatants, while at the same time their opportunities for plunder and outrage are numerous and tempting. It is easy, therefore, to understand the unfavorable opinions of partisan bands usually expressed by great military authorities. Self-interest, professional jealousy and humanity combine in urging them to advocate the entire prohibition of irregular hostilities, or their reduction to a minimum by imposing severe conditions upon any recognition of their legality. Halleck settles the question in a summary way by calling those who engage in partisan warfare robbers and murderers, and declaring that when captured they are to be treated as criminals.<sup>1</sup> This is the view of a general rather than a publicist. It obtained largely in the earlier part of the eighteenth century, when the powers which kept large standing armies on foot would hardly allow the rights of combatants to militia.<sup>2</sup> Military pride accounted for it to some extent, but it was also due to a natural and creditable reaction from the license of times before the distinction between combatants and non-combatants was drawn, and when every subject of one belligerent was free to commit acts of hostility upon every subject of the other. But in the great cycle of wars which began with those of the French Revolu-

<sup>1</sup> *International Law*, Ch. XVIII., § 8.

<sup>2</sup> Hall, *International Law*, § 179 and notes.



tion, the most powerful states of the European continent found good reason to value and rely upon the patriotism of their populations. Irregular troops came therefore to be regarded as permissible even by military men, who often busied themselves with the organization of the national guard and other popular levies. No further doubt was felt as to the legality of militia. It is even included in "l'armée proprement dite" by Article 2 of the military code adopted by the Institute of International Law at Oxford in 1880.<sup>1</sup> The questions that remain concern guerilla troops and levies *en masse*; and with regard to them the principle that they may exist is conceded, the degree of irregularity which is permissible forming the only problem left for solution.

In the Franco-Prussian war of 1870 the French raised irregular bands of *Franc-Tireurs*; but the Prussians declined to recognize them as lawful combatants unless each individual member of them had been personally called out by legal authority and wore a uniform or badge irremovable and sufficient to distinguish him at a distance. At the Brussels Conference of 1874<sup>2</sup> the matter was thoroughly discussed from every point of view. The representatives of the great military powers naturally desired to keep spontaneous movements within the narrowest possible bounds, while the delegates from the secondary states, who have to rely for their defence chiefly upon the patriotism of their people, endeavored to give the widest extension to the right of resistance to an invader. In the debates the case of guerilla bands and that of levies *en masse* were a good deal confused; but at length the Conference came to see that there was a great difference between them, and the attempt to cover both by the same rules was abandoned. With regard to the former, the less powerful states, headed by Belgium and Switzerland, succeeded in foiling the efforts of Prussia and Russia to have it declared that irregular volunteers must be under

<sup>1</sup> *Tableau Général de L'Institut de Droit International*, p. 173.

<sup>2</sup> See § 185.

the Commander-in-Chief. Finally, the Conference adopted a compromise which fairly met the views of all parties. It agreed to accord the rights of combatants to those guerilla bands which

- (a) Have at their head a person responsible for his subordinates.
- (b) Wear some settled distinctive badge recognizable at a distance.
- (c) Carry arms openly.
- (d) Conform in their operations to the laws and customs of war.<sup>1</sup>

It is to be hoped that the concession of the first of these conditions marks the definite abandonment of the theory that members of partisan bodies must, individually and collectively, be summoned to arms by their government and connected directly with its military system. The second condition is just and reasonable, if it be not interpreted to mean that the distance must be considerable. A badge which is visible as far off as the inconspicuous uniform of modern infantry should be amply sufficient. The great point to be secured is its irremovable character. A man cannot have the slightest moral right to the privileges of a combatant, if he appears one minute as the armed defender of his country and the next as a peaceful peasant tilling his fields under the protection of the occupying army. The third condition is justified by the same consideration. The inhabitants of an invaded country must choose whether they will fight or whether they will go about their ordinary business. They cannot do both. Their position is well expressed in Article 82 of the Instructions for the Government of Armies of the United States in the Field, which declares that those who commit hostilities "with intermitting returns to their homes and avocations, or with the occasional assumption of the semblance of peaceful pursuits . . . if captured, are not enti-

<sup>1</sup> British State Papers, *Miscellaneous*, No. 1 (1875), pp. 252-257.

tled to the privileges of prisoners of war, but shall be treated summarily as highway robbers or pirates." The fourth condition is demanded by humanity. Irregular soldiers who do not conform to the laws of war become mere criminals and deserve the severest punishment.

On the whole there seems every reason to be satisfied with these rules. They give sufficient scope to the spontaneous activities of patriotism, without neglecting either the claims of mercy or a reasonable consideration for the safety of the invading belligerent. The lapse of several years, and the criticisms of the leading jurists of the civilized world, have served but to bring out the general approval with which they are regarded. They were adopted with only a few alterations in form by the Institute of International Law and are embodied in the second article of its military code;<sup>1</sup> and though they are not formally binding upon the powers who took part in the Brussels Conference, it will be very difficult for any of them in a future contest to ignore the work of their representatives. Indeed Russia in her war with Turkey of 1877-1878 ordered all her officials to observe them, and distributed among her troops a kind of military catechism which brought to their knowledge in a simple and effective form the principles on which they were expected to act.<sup>2</sup> It is to be hoped that other belligerents will follow her example in this respect. The only case not covered by the Brussels Code is that of isolated individuals in non-occupied districts, who render service to their country by such acts as destroying a road or blowing up a bridge and thus impeding the advance of the enemy. It was brought forward by the Delegate of Belgium, but dropped without being settled, owing to the expression of a general opinion that it would be unwise to attempt to formulate any rule that would cover it.<sup>3</sup>

<sup>1</sup> *Tableau Général de L'Institut de Droit International*, p. 173.

<sup>2</sup> *Ibid.*, pp. 165-166.

<sup>3</sup> *British State Papers, Miscellaneous, No. 1 (1875)*, p. 265.

## § 220.

We have next to consider the subject of

*Levies en masse.*

They may be regarded historically in the same light as guerilla troops; for the account given in the last section of the way in which the latter came to be regarded as legitimate agents of warfare applies to them also. But we must not go further and place them under the rules which deal with partisan forces. Not only do they differ from irregular bands in some essential circumstances, but they also differ so widely among themselves that the same provisions will not apply to all of them. When the whole manhood of a country is called to arms by its government and drafted into its armies, there can be no doubt as to the legality of the process.<sup>1</sup> Such a levy is merely a specially drastic and comprehensive method of recruiting. Its adoption is a matter of internal policy, not of international concern. A good example is to be found in the French levy *en masse* of 1793, which filled the ranks of the revolutionary armies with brave and devoted soldiers, who had as much right as other soldiers to the privileges of combatants. Another kind of levy *en masse* may take place in countries where the entire male population is passed through the army. If at the approach of an invader the people rise, either spontaneously or in obedience to an order from the government, and at once adopt the military organization to which they have been trained, they are to be regarded as regular combatants. The Delegate of Germany at the Brussels Conference alluded to this as a possible case, and pointed out that in his own country there was a *Land-sturm* numbering nearly three million men, who would form the levy *en masse* in case of necessity.<sup>2</sup>

<sup>1</sup> Acolas, *Droit de la Guerre*, pp. 49-50.

<sup>2</sup> British State Papers, *Miscellaneous*, No. 1 (1875), p. 263.

A different question arises when the ordinary untrained inhabitants of a non-occupied district rise at the approach of an invader, and either alone or in conjunction with regular troops endeavor to beat him off. This is the commonest case and that about which the most marked difference of opinion exists. At the Conference of 1874 the smaller powers contended almost passionately for its legality. The Delegate of Belgium declared that to the patriotism which inspired such risings "all the states here represented owe those pages of their history of which they are most proud." After long discussion it was agreed that "the population of a non-occupied territory, who on the approach of the enemy, of their own accord take up arms to resist the invading troops, . . . shall be considered as belligerents if they respect the laws and customs of war." These words form part of Article 10 of the Code which received the assent of the Conference.<sup>1</sup> It was rightly deemed that the masses of a popular levy would be sufficient evidence of their own hostile character, even though no badges were worn by the individuals of whom they were composed.

A case apart from all the others, and least likely of any to be treated with leniency, occurs when the inhabitants of occupied districts break out into a general insurrection against the invaders. The army of occupation is obliged for the sake of its own safety to treat such insurgents with the utmost severity. The Code of the Brussels Conference is silent on the subject of the fate in store for them, and so is the Manual of the Institute of International Law, while Article 85 of the Instructions for the Armies of the United States renders them liable to the death penalty under the name of "war-rebels." At Brussels the constant conflict between the views of the great military powers and the secondary states became more marked than usual when their treatment was discussed. The German Delegate wished to subject them by express enactment "to the laws of war in

<sup>1</sup> British State Papers, *Miscellaneous*, No. 1 (1875), pp. 255, 321.

force in the occupying army." But the representative of the Netherlands stoutly objected on the ground that "to deliver over in advance to the justice of the enemy those men who from patriotic motives and at the risk of their lives expose themselves to all the dangers consequent upon a rising, would be an act which no government would dare to bring forward."<sup>1</sup> In consequence of this disagreement no mention was made of the case in the projected military code; but there can be no doubt that the invader is allowed by the laws of war to treat all concerned in such risings as unauthorized combatants. Indeed this proposition was not seriously controverted. The objections raised were directed against any verbal recognition of it which would seem tantamount to a surrender of high-souled patriots by their own government to the enemy's executioners.

### § 221.

We pass on to deal with the employment of

#### *Savage Troops.*

They may be embodied, drilled and disciplined, as soldiers in the regular armies of civilized powers, or they may be used as allies and auxiliaries, organized in their own way and under the command of their own chiefs. In the latter case the amount of control which can be exercised over them is very small; and it is much to be wished that International Law could prohibit the acceptance of assistance from such unsatisfactory allies. But nothing of the kind has been done. Civilized states receive without scruple the aid of savage tribes in their warfare with barbarous or semi-barbarous foes. In their Tonquin expedition of 1883-1884 the French employed "Yellow Flags" against the hostile "Black Flags." In the numerous "little wars" carried on by the British in Africa the proceedings of "friend-

Savage troops.

<sup>1</sup> British State Papers, *Miscellaneous*, No. 1 (1875), p. 263.

lies " form an almost invariable incident of every struggle, and the United States are glad to accept the services of Indians who will fight against their brothers in the fierce warfare of the Western plains. Even when both the principal belligerents are civilized, they have sometimes made use of barbarian auxiliaries in their struggles. Throughout the last century the English and French habitually employed Red Indian Tribes in their North American wars. The British let them loose against the revolted Colonists, and the Colonists did their best to turn them against Great Britain. The Russians sent Circassians into Hungary in 1848, and the Turks flooded Bulgaria with Bashi-Bazooks in the war of 1877. Each of these instances gave a greater shock to the civilized world than its predecessor; and we may perhaps venture to hope that the force of enlightened opinion will before long compel the leading members of the family of nations to refrain from putting savages or semi-savages into the field, unless their foes themselves are barbarians. For the disuse of savage allies in these latter cases we shall probably have to wait till the feeling of human brotherhood has grown much stronger than it is to-day.

There can be no doubt about the legality of taking recruits from barbarous races and forming them into troops and regiments. If they are placed under military discipline, organized as part of the army of a civilized state, and led by civilized officers, they may be used without the slightest violation of the laws of war. The United States have their red-skinned cavalry, the French their Turco brigades, the British their Indian army. There is hardly a power possessed of a colonial empire, or ruling over martial races, which does not enrol native troops. International Law neither forbids their enlistment nor places limitations upon their employment. It would certainly be humane to reserve them for use against border tribes and in warfare with people of the same degree of civilization as themselves. But no such restraints at present exist, and Europe may yet have to pay the penalty

for its remissness by suffering the horrors of a struggle for the Empire of the East, in which Hillmen from the Himalayas, Usbeks from Central Asia, and Arabs from Algeria work their will upon its brightest provinces and most defenceless populations.

### § 222.

We must now consider the legality of

#### *Spies.*

They are defined in Article 19 of the Brussels Code as "those who acting secretly or under false pretences, collect or try to collect information in districts occupied by the enemy with the intention of communicating it to the opposing force." Article 22 declares that soldiers who have penetrated within the enemy's lines without concealing or disguising their military character are not to be considered as spies, neither are "military men (and also non-military persons carrying out their mission openly) charged with the transmission of despatches either to their own army or to that of the enemy." It also excludes individuals sent in balloons to carry despatches or perform other services. Article 20 lays down that "a spy, if taken in the act, shall be tried and treated according to the laws in force in the army which captures him," and Article 21 adds that the treatment of a prisoner of war is to be accorded to the spy who, after carrying out his mission, and rejoining the army to which he belongs, is subsequently captured by the enemy. These rules embody the best and most humane modern practice, and indeed go somewhat beyond it in insisting upon a trial of the captured spy, who is often shot or hanged on the spot with scant ceremony. They further mark the definite abandonment of the strange theory adopted by the Germans during the siege of Paris in 1870-1871, that those who reconnoitred from balloons were guilty of espionage and therefore liable to the penalty of death.



The law on the subject of spies is clear and undisputed. They may be used, but they take their lives in their hands when they venture upon their secret missions. Here we might leave the subject, were it not that certain statements found in the works of many text-writers cannot be allowed to pass without challenge. Their authors seem to imagine that to be a spy is necessarily dishonorable. They, therefore, assert that a sovereign has no right to require or even to ask for such a service from his subjects, though he may accept it if voluntarily offered; and some of them doubt whether he is not tainted with dishonor if he holds out inducements and rewards in order to encourage people to obtain for him secret information.<sup>1</sup> These statements show great confusion of thought and judgment. Some spies are double traitors who sell their own side to the enemy for money, and then in turn sell the enemy by giving him false intelligence. They are among the vilest of mankind; and only slightly below them in villainy come those who keep their disgraceful bargain, and are content to be guilty of treachery without the addition of fraud. But there are others who risk their lives in order to obtain by secret means information of the greatest value to their own side; and they are perfectly honorable as well as courageous men. What moral obliquity can there be in penetrating within the enemy's lines disguised as a pedler, and furtively sketching his batteries? Military men know well enough that there are spies and spies; and when they stop to think they soon perceive that some kinds of spy-service deserve to be regarded as highly meritorious. This point is brought out in a significant passage in Napier's *Peninsula War*.<sup>2</sup> The author, in describing how admirably Wellington was served in the matter of information, says: "He had a number of spies among the Spaniards who were living within the French lines; a British officer in disguise constantly visited

<sup>1</sup> e.g. Vattel, *Droit des Gens*, Liv. III., § 179; Halleck, *International Law*, Ch. XVIII., §§ 26, 28.

<sup>2</sup> Vol. IV., Bk. XIV., pp. 220-221.

the French armies in the field; a Spanish state-counsellor living at the headquarters of the first corps gave intelligence from that side, and a guitar-player of celebrity, named Fuentes, repeatedly making his way to Madrid brought back advice from thence. . . . With the exception of the state spy at Victor's headquarters, who being a double traitor was infamous, all the persons thus employed were very meritorious. The greater number, and the cleverest also, were Spanish . . . who, disdaining rewards and disregarding danger, acted from a pure spirit of patriotism, and are to be lauded alike for their boldness, their talent and their virtue." Considerations such as these should serve to mitigate the harsh judgments sometimes pronounced on spies as a class, as if they were all alike. It is impossible to arrive at any reasoned conclusions unless we distinguish, as Napier does, between those who carry devotion and patriotism to the point of risking their lives in cold blood and without any of the excitement of combat, in order to obtain within the enemy's lines information of the utmost importance to their country's cause, and those who betray the secrets of their own side for the sake of a reward from its foes. The first are heroes, the second are traitors; and it is the height of injustice to visit both with the same condemnation. Military reasons demand that the right to execute spies, if caught, should exist; but unless considerations of safety imperatively demand the infliction of the last penalty, a general should commute it into imprisonment. It should, however, be clearly recognized that in many cases the execution, though necessary for the safety of those who inflict it and the success of their cause, involves no more stigma than a fatal wound upon the battle-field. Both Captain Hale and Major André, for instance, were rightly executed as spies;<sup>1</sup> but, as their part in the deeds for which they suffered had nothing dishonorable in it, they were not dishonored by their death.

<sup>1</sup> Halleck, *International Law* (Baker's ed.), II, 32-34, and notes.

## § 223.

Hitherto we have dealt with agents employed in land warfare. It is now time to turn to nautical affairs and consider the case of

*Privateers.*

They may be defined as vessels owned and manned by private persons, but empowered by a commission from the state, called a Letter of Marque, to carry on hostilities at sea. The law declared the commission Privateers. to be revocable for bad conduct on the part of the privateer; and other means, such as the lodgment of security and liability to search by public vessels of the country whose flag she carried, were taken to secure that she did not violate the laws of war. But in spite of all precautions, privateers were always a most unsatisfactory force. When it was first held about the beginning of the fifteenth century that some authorization from a belligerent was necessary before a private vessel could perform hostile acts, such authorizations were given to all who applied for them. Thus neutrals as well as subjects of the belligerents acquired a right to cruise against commerce; and, as privateers were allowed to keep for themselves all or nearly all the proceeds of the prizes they took, privateering became a lucrative trade for the lawless and adventurous spirits who abounded among sea-faring populations. The scandal grew so great as modern trade developed, that in the eighteenth century most of the states of Europe passed laws for the punishment of any of their subjects who took Letters of Marque authorizing depredations upon the commerce of any power with which they were at peace. In the United States similar provisions were placed upon the Statute Book by Congress in 1797 and 1816. These legislative acts have become general, and they have practically put a stop to privateering by neutral subjects. There have been only two instances in modern times of the offer by a belligerent to accept the assistance of neutral

privateers, and they are both connected with the American continent. The first took place in 1845, when Mexico, at the beginning of her war with the United States, proclaimed her willingness to give Letters of Marque to all who applied for them, and the second in 1861, when the Government of the Confederacy made a similar offer at the commencement of the Civil War in the American Union. But in neither case did a neutral subject seek the proffered authorization,<sup>1</sup> though it appears from a despatch of Mr. Buchanan, dated June 13, 1847, that he was then under the impression that Spaniards had accepted Mexican commissions, for he declares that such persons will be treated as pirates according to the provisions of the treaty of 1795 between the United States and Spain.<sup>2</sup>

Laws and treaties such as those referred to above have put a stop to privateering of the most indefensible kind. There remains, however, the use as commerce destroyers of private vessels belonging to belligerent subjects and fitted out by them for purposes of private gain. During the latter half of the eighteenth century some attempts were made to get rid of this form of privateering along with the other. With regard to the advisability of its abolition, opinion was divided both in the Old World and in the New. Franklin succeeded in embodying in the treaty of 1785 between the United States and Prussia an article by which the contracting powers agreed not to make use of privateers of any kind if they should be at war with each other.<sup>3</sup> But Jefferson held that they were a cheap and effective weapon of offence, and went so far as to say in a letter to Moproe of Jan. 1, 1815, "Let nothing be spared to encourage them." His views prevailed; and it has been as much the settled policy of the United States to object to the abolition of privateering as to

<sup>1</sup> Dana, Note 173 to his edition of Wheaton's *International Law*.

<sup>2</sup> Wharton, *International Law of the United States*, § 385; *Treaties of the United States*, p. 1010.

<sup>3</sup> *Treaties of the United States*, p. 906.

forward the exemption of private property from maritime capture. The latter would necessarily carry with it the former, but the former is possible without the latter. The object of American policy has been to secure that the two changes shall come together, if they come at all.<sup>1</sup> In Europe, on the other hand, opinion steadily moved in the direction of disapproval of privateers, and a strong feeling grew up in favor of putting an end to them without waiting for further ameliorations of the law of capture at sea. They were freely used in the great struggle between England and Revolutionary and Imperialist France; but both Nelson and Codrington condemned them, and the latter did not hesitate to charge the privateers of both sides with letting each other alone and hoisting whatever colors were necessary to effect the capture of any merchantmen that came in their way. He declared that their proceedings were "nothing short of piracy."<sup>2</sup> The spirit that animated these words became general, and at the commencement of the Crimean War in 1854 England and France notified their determination to rely upon public armed ships alone, and not to issue Letters of Marque to private individuals. They were induced to take this course partly by considerations of humanity and a desire to save neutral commerce as far as possible from the injuries inflicted on it by belligerents, and partly from fear lest Russia should be able to obtain the services of a strong fleet of American privateers.<sup>3</sup> During the war both sides refrained from authorizing private vessels to cruise against commerce, and at its close the abolition of Privateering was decreed by the first article of the Declaration of Paris. We have already seen how the Government of the United States strove to couple with this act the further reform of exempting private property from belligerent seiz-

<sup>1</sup> Wharton, *International Law of the United States*, § 385.

<sup>2</sup> Napier, *Peninsula War*, Vol. IV., Appendix, p. 497.

<sup>3</sup> Twiss, *Belligerent Right on the High Seas since the Declaration of Paris*, pp. 10-12.

ure unless it were contraband of war.<sup>1</sup> Its efforts were unsuccessful, and its assent was withheld from the Declaration; but it used no privateers in its fierce struggle with the seceding South, and none have been sent forth to prey on sea-borne trade in any of the wars which have taken place between civilized nations since 1856. It can hardly be doubted that no more will be heard of them in future wars. Enlightened opinion condemns them, and the interests of commerce are opposed to their continued existence. The powers which have declined to sign the Declaration of Paris may possibly have escaped the technical obligation to refrain from using them; but they are not likely to run counter to the general sense of the civilized world, and bring down upon themselves as belligerents the ill-will of all neutral powers who possess a maritime trade. And even if they were willing to take the risk, the cost of an effective cruiser is now so enormous that few private individuals would be able to meet it with all the additional risks of capture and loss as well.

### § 224.

Our last heading in connection with the agents of warfare is

#### *A Volunteer Navy.*

This is a new product of creative ingenuity, and it can best be explained by a brief account of the circumstances which first brought it before the world with a claim to be regarded as a naval force of undoubted legality. In July, 1870, at the beginning of the great war between France and Germany, Prussia endeavored to make up for the weakness of its state navy, by utilizing its merchant ships for warlike purposes under special conditions. The patriotism of seamen and ship owners was appealed to, and they were invited to place themselves and their vessels

*A Volunteer Navy.*

<sup>1</sup> See § 116.

at the service of the Fatherland. The Volunteer Navy thus formed was to carry the German flag, and was to be under naval command and naval discipline. The officers were to receive commissions from the state for the period of the war, and the crews were in like manner to be temporarily enrolled in the government service. The owners were to receive a certain sum as hire and to be compensated if the vessels were destroyed while under the control of the naval authorities. If prizes were taken, the sailors who took part in the capture were to be rewarded by money payments.<sup>1</sup> These offers and appeals do not seem to have been very enthusiastically received by the seamen and traders of Germany, for throughout the war no ship of the proposed Volunteer Navy ever put to sea. But outside the Fatherland the plan attracted a good deal of attention. The French Government denounced it as a disguised form of privateering and a gross violation of the Declaration of Paris. The British Ministry, when called upon to say how they would regard it, published an opinion of the Law Officers of the Crown, who had come to the cautious conclusion that there was "a substantial difference" between it and the system against which the first article of the Declaration of 1856 was directed, and declared that they could not object to the Prussian Decree.<sup>2</sup> Many publicists of repute have discussed the matter, but no general agreement has been reached. Calvo and Hall condemn the proposal,<sup>3</sup> but Bluntschli, Twiss, and Geffcken see no serious objection to it on the score of legality.<sup>4</sup>

It is impossible to suppose that the question raised in 1870 was settled by the collapse of the Prussian project. Maritime states will seek some unobjectionable way of util-

<sup>1</sup> Wharton, *International Law of the United States*, § 885.

<sup>2</sup> British State Papers, *Franco-German War, No. 1 (1871)*, p. 22.

<sup>3</sup> Calvo, *Droit International*, § 2086; Hall, *International Law*, § 181.

<sup>4</sup> Bluntschli, article in *Revue de Droit International*, Vol. IX., p. 552; Twiss, *Belligerent Right on the High Seas since the Declaration of Paris*, pp. 12-14; Geffcken, Note to Heffter, *Droit International de L'Europe*, p. 279.

izing in war the services of their mercantile marine. A movement will be carried on in naval affairs similar to that whereby militia and volunteer corps have gradually won recognition in land warfare. In the winter of 1877-1878, when there was imminent danger of hostilities between England and Russia, the latter power accepted the offer of a patriotic association to create a Volunteer Fleet, the vessels of which were to be purchased by private subscription, but made over to state control during the contemplated war, and commanded by officers of the Imperial Navy. Fortunately, the questions at issue were settled without further fighting by the Treaty of Berlin; but the Russian Volunteer Fleet survived the circumstances which gave it birth, and exists at the present time. It receives an annual subsidy from the government on certain conditions as to the number and efficiency of the cruisers, and some of its ships are regularly employed in carrying convicts and soldiers from the Black Sea ports to Siberia.<sup>1</sup> The Sultan has been constrained by diplomatic pressure to regard them as merchant vessels, in order that they may freely pass the Dardanelles and the Bosphorus, which are closed in time of peace to the men-of-war of foreign states;<sup>2</sup> and this circumstance will probably prove embarrassing should Russia wish to claim for them the position of lawful combatants in some future struggle. Great Britain and America have adopted a somewhat different system. The former led the way in 1887 by entering into agreements with the Cunard Line, the White Star Line, and other great steamship companies, whereby, on consideration of an annual subsidy, they agreed to sell or let certain swift vessels to the government at a fixed price and on short notice, and to build new ships according to plans to be approved by the Admiralty, who were to be at liberty to acquire them on terms similar to those accepted in the case of the existing fleet. Half the seamen on board the vessels subject to these agreements were to be engaged

<sup>1</sup> *Statesman's Year Book for 1894*, p. 891.

<sup>2</sup> See § 109.



from the Royal Naval Reserve, and the Admiralty was to have the right of placing on board fittings and other arrangements which would facilitate the speedy equipment of the vessels as cruisers in the event of war.<sup>1</sup> In 1892 the Government of the United States acquired powers of a like kind over the vessels of the American Line. There is nothing in these agreements to which the most scrupulous legalist can object. Should the vessels subject to them be used in war, they will be added to the national navy by hire or purchase, and will be manned by officers and men belonging to the public forces. The practical working of the Russian plan is not so clear; but if it means nothing more than the payment for armed and duly commissioned cruisers by voluntary subscriptions instead of taxes, no publicists will venture to denounce it as a violation of the Declaration of Paris. The legality of a Volunteer Navy must depend, like the legality of a Volunteer Army, upon the closeness of its connection with the state, and the securities it affords for a due observance of the laws of war.

### § 225.

In early ages and among barbarous peoples all methods of destruction appear to have been used indifferently against an enemy, and any restraints that were practised seem to have arisen from the idea that a brave and generous warrior should not avail himself of new and unusual weapons or tactics. Thus the Zulus, after the battle of Ulundi in 1878, expressed their surprise that such courageous and honorable foemen as the British should have condescended to use breechloading rifles, which fired six times while they were firing once with their muzzle-loaders, and the Arab prisoners taken at El Teb in 1884 characterized as an unworthy trick the rear attack by which they had been defeated. Civilized belligerents,

Prohibition of some instruments of warfare and conditional legality of others.

<sup>1</sup> British State Papers, *Subvention of Merchant Steamers for State Purposes*, 1887.

however, have not been swayed by similar feelings. Men of science rival one another in the invention of new and more potent instruments of destruction, and states compete for exclusive rights in them. The government that deems it possesses machinery for taking life more efficacious than anything to be found in the arsenals of its neighbors keeps secret the processes of manufacture, and guards with the most zealous care the knowledge which it fondly believes will one day be transmuted into power. Restrictions upon the use of means of slaughter have indeed been introduced into the laws of warfare; but they are based on the idea of humanity, not on that of fairness. It is now an accepted principle that one side may put only so much stress upon the other as is sufficient to destroy its power of resistance. This, when applied to instruments and methods of destruction, forbids those which inflict more suffering than is necessary in order to kill or disable an enemy. It also limits and conditions the employment of means which are not altogether prohibited. Side by side with it there is a strong and healthy feeling against treachery, and the two together are responsible for several practical rules which will be discussed in the following sections. It will obviously be impossible to go through all the means and instruments of warfare, nor is it necessary to do so. The prohibitions are comparatively few, and what is not forbidden is allowed. All that it will be needful to do is to take the chief restrictions and deal with them one by one.

### § 226.

We must first note that

*Assassination is forbidden.*

The life of some one person is often of the last importance to a cause, and when that is the case its enemies are under great temptations to get rid of its champion by murder, if all other means fail. Such assassinations seem to have been sometimes regarded with approval

Assassination  
prohibited.

by the leading nations of the ancient world; witness the praise bestowed by Roman writers upon the legendary deed of Mutius Scævola. Grotius draws an elaborate distinction between "assassins who violate express or tacit faith" and "those who are not bound by any such tie of good faith";<sup>1</sup> and complicates his reasoning by refinements based on his theory of a Law of Nature and its relation to the Law of Nations, and his division of wars into those which are regular and formal and those which are irregular and informal. As he clearly sees, the presence or absence of treachery is the all-important matter; but it is in the attendant circumstances of the deed rather than in the persons of those who do it that we must seek for its justification or condemnation. Modern International Law distinguishes between dashes made at a ruler or commander by an individual or a little band of individuals who come as open enemies, and similar attempts made by those who disguise their enemy character. A man who steals secretly into the opposing camp in the dark, and makes alone, or with others, a sudden attack in uniform upon the tent of king or general, is a brave and devoted soldier. A man who obtains admission to the same tent disguised as a pedler, and stabs its occupant when lured into a false security, is a vile assassin. The attempt to procure such a murder is as criminal as the murder itself. Article 148 of the Instructions issued in 1863 to the armies of the United States declares with perfect justice that "Civilized nations look with horror upon offers of rewards for the assassination of enemies, as relapses into barbarism." The Brussels Conference of 1874 numbered "murder by treachery of individuals belonging to the hostile nation or army" among the means of injuring the enemy that were forbidden by Article 13 of its projected Code; and Article 8 of the Manual of the Institute of International Law forbids "treacherous attempts upon the life of an enemy."

<sup>1</sup> *De Jure Belli ac Pacis*, III., IV., XVIII.

## § 227.

Another important restraint is indicated by the words

*The use of poison is condemned.*

This was one of the earliest prohibitions. Savages use poisoned weapons; but civilized mankind has expelled them from its warfare, and recoils with horror from the poisoning of food or water, or the wilful contamination of the enemy with disease. The secrecy and cruelty associated with death by poison, and the danger that innocent people may be made to suffer along with or instead of foes, will serve to account for the deep-seated abhorrence of such a method of destruction. Grotius condemns it as contrary to the sentiment of the best and most advanced nations,<sup>1</sup> and the other text-writers agree with him. Modern Military Codes mention it only to exclude it from the permissible means of injuring an enemy.<sup>2</sup>

## § 228.

We may add to the statements already made the proposition that

*Projectiles which inflict useless suffering are prohibited.*

This rule springs directly from the principle that a belligerent may not inflict more pain and injury than is necessary to destroy the adversary's power of resistance. One of its applications is settled by express agreement. In 1868 all the powers of Europe, with the exception of Spain, sent delegates to a Military Commission at St. Petersburg, the result of which was the signature of a Declaration prohibiting the use of explosive pro-

Projectiles which  
inflict useless  
suffering forbid-  
den.

<sup>1</sup> *De Jure Belli ac Pacis*, III., IV., XV.-XVII.

<sup>2</sup> e.g. *Manual of the Institute of International Law*, see *Tableau Général de L'Institut de Droit International*, p. 174.

jectiles weighing less than fourteen ounces (400 grammes).<sup>1</sup> The signatory powers are bound by this instrument in wars among themselves, and it is hardly conceivable that a civilized country like the United States of America will wish to avail itself of its position outside the agreement to use in any future struggle rifle bullets which inflict incurable wounds and shatter limbs as well as disable them. Other prohibitions of a similar kind rest on general custom. For instance the use of what is technically called "langridge" has been condemned for more than a century. The term includes nails, brass buttons, bits of glass, knife-blades, and any kind of rubbish that can be fired out of a gun. The objection to such projectiles flows from the fact that they inflict jagged wounds, and cause more suffering than bullets, without being one whit more effective in preventing combatants from continuing the fight. Chain shot and split balls have been regarded as unlawful, and there has been a long and sometimes amusing controversy about red-hot shot. Military casuists have been found to maintain that it is lawful in defence and unlawful in aggression, lawful for forts and unlawful for ships. But these nice questions of belligerent ethics have been relegated to the sphere of purely intellectual exercise by the invention of rifled cannon. The shot furnace is no longer a part of the ordinary equipment of forts and line-of-battle ships, and red-hot shot is almost as completely a thing of the past as the cross-bow which was once anathematized by a Council of the Church, and the arquebus which the Chevalier Bayard so unsparingly condemned.<sup>2</sup> Many of these polemics were due to a confusion of ideas. Men could not make up their minds whether means of destruction were to be deemed unlawful because of their newness, or their unfairness, or their secrecy, or their cruelty, and they generally solved the difficulty by objecting to what they disliked, and regarding as unobjectionable

<sup>1</sup> Hertslet, *Treaties*, XIII., 79-80.

<sup>2</sup> Maine, *International Law*, Lect. VII.

what suited their tastes or worked to their advantage. Now, however, the old difficulties have vanished, on account of the acceptance by all civilized nations of the principle that the only legitimate object of warfare is to weaken the forces of the enemy and induce him to sue for terms, by depriving him of the men and means for carrying on the conflict. The legality of weapons is measured, not by their destructiveness, but by the amount of pain they inflict compared with the amount of disablement they cause. Men may be wounded or slain wholesale, but they may not be tortured. The use of torpedoes, for example, is perfectly lawful, though they may hurl a whole ship's crew into eternity without a moment's warning, but the deliberate insertion of a drop of sulphuric acid into the head of a bullet, from which it would exude on contact with human flesh, would be execrated as a gross violation of the laws of civilized warfare. The Brussels Conference did but voice the general sentiment of the leading nations of the world, when it prohibited in Article 18 of its Military Code "the use of arms, projectiles or substances which may cause unnecessary suffering."

### § 229.

The next statement to be made and discussed is that

*Devastation is generally unlawful, but may be justified under special circumstances.*

The savage customs of ancient warfare allowed unlimited destruction in an enemy's territory. We have already seen how in comparatively recent times better practices were gradually introduced,<sup>1</sup> till now an invader, instead of being free to destroy a country, finds himself charged with the duty of protecting property and industry within it. Grotius endeavored to restrict the old right of unlimited destruction by laying down that

Devastation generally regarded as unlawful, but justified in special cases.

<sup>1</sup> See §§ 185, 191, 202.

only "such ravage is tolerable as in a short time reduces the enemy to seek peace," and it is evident that in his opinion the better course would be to abstain from it altogether.<sup>1</sup> The publicists of the last century endeavored to introduce further restrictions. Vattel, for instance, says that the utter destruction of a hostile territory is authorized and excused in two cases only. The first is when there exists a "necessity for chastising an unjust and barbarous nation, for checking its brutality and preserving ourselves from its depredations," and the second exists when there is evident need "for making a barrier, for covering a frontier against an enemy who cannot be stopped in any other way."<sup>2</sup> In discussing this he practically adds as a third case the destruction that may be required in order to carry on field operations or the works of a siege. There can be no doubt about this last instance. The laws of war allow the suburbs of a town to be destroyed in order to keep the besiegers from effecting a lodgment in them, or afford free scope to the action of artillery. Buildings may be demolished and trees cut down to strengthen a position, and even villages burnt to cover a retreat. But such devastation must be absolutely necessary for the attainment of some direct and immediate military end. It is not enough that there should be merely a vague expectation of possible advantage to accrue from the act.

In warfare with barbarous or semi-barbarous races the first exception allowed by Vattel is often acted upon. It is commonly supposed that a vast impression is made upon the minds of savages by driving off their cattle, destroying their crops, and setting fire to the thatch of their mud huts. And if the latter operation is performed by shells, and as an incidental consequence a good many of the inhabitants are slain, the impression created is held to be so deep and lasting that an abiding sense of the justice and power of the

<sup>1</sup> *De Jure Belli ac Pacis*, III., XII.

<sup>2</sup> *Droit des Gens*, III., §§ 167-168.

white man can be confidently expected to grow up in the bosoms of all the survivors. It may be so. The surprises of anthropology are many; and it is possible that a mass of evidence will be accumulated to show that conduct which would rouse in civilized mankind the passions of savages tends to create in the savage an enlightened sense of the beauties of civilization. Meanwhile we may perhaps be permitted to doubt, and to express a hope that retaliatory expeditions against barbarous tribes could be a little less inflexible in their justice and a little more discriminate in their punishments. We cannot, however, say that destruction and ravage are forbidden to them by the law of nations. Usage decides; and usage is as we have described it.

Vattel's second exception has no longer any force. A belligerent who devastated his enemy's territory in order to make a barrier and cover his own frontier, would now be held up to the execration of the civilized world. The ravaging of the Palatinate in 1689 was justified by the French Government on this ground; but, as Vattel himself says with regard to it, "All Europe resounded with invectives and reproaches." We have advanced a long way in the direction of humanity towards foes since that time, and what was denounced then would not be tolerated now. Excuses far better than the supposed necessity of making a barrier have not sufficed to save much less terrible proceedings from general reprobation. The burning of the public buildings of Washington by the British forces in 1814 has not been justified at the bar of history by the plea of retaliation,<sup>1</sup> and few would care to rest the fame of Sherman and Sheridan upon their devastations in Georgia, South Carolina and the Shenandoah Valley, though it was alleged in their favor that they destroyed the storehouse and granary of the Confederacy.

But if a population is willing to consign to destruction its own homes and possessions rather than allow an enemy to

<sup>1</sup> See § 202.



make use of them, International Law in no way forbids such a piece of heroic self-sacrifice. The action of the two hundred thousand inhabitants of Moscow who in 1812 quitted their city, and allowed it to be given to the flames in order that it might not afford safe winter quarters to the invading French, has always been regarded as a splendid exhibition of patriotism. Even utter destruction of large tracts of fertile country has been applauded, when it was the only way to stop the advance of a relentless enemy. Thus when the Dutch in the crisis of their war of independence cut on several occasions the dykes that kept out the sea, and restored whole districts to the waves rather than allow the Spaniards to subdue them, they were not deemed to have violated the laws of war, but, on the contrary, were praised for their determination and devotion. A broad distinction must be drawn between devastation by an enemy and devastation by a population to repel an enemy. A high-spirited nation may prefer material ruin to political degradation. Its noble resolution will evoke universal admiration and respect. But very different feelings await the invader who strives to advance his cause by turning a smiling country into a barren wilderness. Such warfare is unworthy of civilized beings and calls for the sternest reprobation. The only destruction permissible is that which is "imperatively required by the necessity of war."<sup>1</sup> Even in bombardments it is now deemed necessary to spare as far as possible churches, museums and hospitals, and not to direct the artillery upon the quarters inhabited by civilians, unless it is impossible to avoid them in firing at the fortifications and military buildings.<sup>2</sup> Open and undefended places should not be bombarded at all; and recent proposals to extort large sums from rich and defenceless coast towns, by the agency of a squadron whose guns should lay them in ruins in case

<sup>1</sup> *Brussels Code*, Art. 13.

<sup>2</sup> *Brussels Code*, Arts. 15-17; *Manual of the Institute of International Law*, Arts. 31-34.

of refusal, are retrograde and barbarous.<sup>1</sup> The power which acted upon them would expose itself to severe reprisals, incur the enmity of neutrals, whose property would assuredly be damaged in the general destruction, and in all probability render the vessels entrusted with the task an easy prey to a defending fleet when their ammunition was exhausted by their abominable work. There is little real danger of a return to the cruel and predatory coast warfare of the Middle Ages.

### § 230.

The last rule we have to lay down with regard to the methods adopted in warfare is that

*Stratagems are allowable unless they violate good faith.*

Tricks and deceits are strictly forbidden in the mutual intercourse of peaceful life, but in war they are permitted, and every belligerent must be on his guard against them. Their lawfulness depends upon the answer to the question whether they are violations of express or tacit understandings. In peace we expect our fellows to treat us in an open and considerate manner. In war we expect advantage to be taken of our defects and misfortunes. But even in the midst of hostilities there is a general understanding that belligerents shall refrain from attempts to hoodwink one another with regard to certain matters, and it is as immoral to violate these conventions as it would be to lie and cheat in ordinary society. A national or regimental flag, for instance, means that those who use it are members of the forces of the state to which it belongs, and any attempt on the part of foes to hoist it in battle for the purpose of luring troops to their destruction is justly characterized by the American Instructions as "an act of perfidy by which they lose all claim to the protection

Stratagems  
allowed except  
when they violate  
good faith.

<sup>1</sup> Hall, *International Law*, §§ 140, \* 186.

of the laws of war.”<sup>1</sup> Similarly it is a breach of a universally accepted understanding, and therefore infamous, to use the Geneva Cross as a protection for magazines, to attract an adversary by signals of distress and then attack him, or to withdraw an army under cover of negotiations for its surrender. But other stratagems, such as leading the enemy into an ambush, deceiving him by false intelligence, or making feints in order to withdraw his attention from the real point of attack, are perfectly innocent, because they are no violations of the tacit agreement which underlies civilized warfare, and every general knows that he must guard against them by his own vigilance. The understanding to which we refer includes two somewhat arbitrary rules, which are nevertheless generally received and must therefore be acted upon by honorable belligerents. A ship of war may approach another vessel under false colors, but it must run up its true flag before it fires the first shot; and troops may be clothed in the uniform of the enemy in order to creep unrecognized or unmolested into his position, but during the actual conflict they must wear some distinctive badge to mark them off from the soldiers they assail.

<sup>1</sup> *Instructions for the Government of Armies of the United States in the Field*, Art. 65.

## CHAPTER VII.

### THE NON-HOSTILE INTERCOURSE OF BELLIGERENTS.

#### § 231.

Non-hostile intercourse can be carried on during war. DURING war a certain amount of more or less amicable intercourse takes place between the belligerents. We cannot call it pacific, because it presupposes the existence of hostilities. On the other hand, it certainly is not warlike, for it involves at least the temporary cessation of active operations on the part of the combatants, or some of them. We are therefore obliged to characterize it as non-hostile, an epithet which has the merit of expressing exactly what we mean, though it is by no means smooth and euphonious. The amount of such intercourse which takes place depends upon the wishes of the belligerents, and therefore varies not only from war to war, but also in different periods of the same war and in different parts of the same theatre of hostilities. It is divided into several kinds, the chief of which we will consider in due order. It is impossible to give all because they are so numerous and so frequently modified by the incessant changes of warfare. Such words and phrases as "safeguards," "licenses to reside," "grants of asylum," and others of a like kind, carry with them their own explanation. Moreover, the things they signify are hardly important enough to be placed in a class by themselves.

## § 232.

The first of the *commercii belli* with which we have to do are

*Flags of Truce.*

These are white flags used by one side as a signal that it desires a parley with the other. Article 43 of the Brussels Code declares that "An individual authorized by one of the belligerents to confer with the other, on presenting himself with a white flag, accompanied by a trumpeter, bugler or drummer, or also by a flag-bearer, shall be recognized as the bearer of a flag of truce." Flags of Truce. If necessary, an interpreter may be added. The party enjoys "the right of inviolability," that is to say, its members may not be subjected to personal injury or detained as prisoners. But the obligation to refrain from molesting them is not absolute. A commander may give notice to his opponent that he will for a certain period decline to receive flags of truce, and if the enemy continues to send them in spite of this notification, they may be fired upon. Their bearers may be blindfolded in cases where there is no question of excluding them, and they are held bound in honor not to take advantage of their position for the purpose of obtaining military information, whether or no physical means are used to hinder them. But if important movements are on foot, and it is impossible that they should have failed to acquire some knowledge of them by the evidence of their own senses, they may be kept in honorable detention for a little while, till the operations are over, or till it is no longer necessary to keep them secret. Anything approaching to treachery on the part of the bearer of a flag of truce deprives him of personal inviolability. If he purchases plans, or incites soldiers to desertion, or attempts to sketch defences, he may be deprived of liberty, or, in extreme cases, executed as a spy. These rules apply *mutatis mutandis* to naval warfare. At sea flags of truce are sent in boats, and are met by boats fly-

ing a similar flag and conducted to the ship on which the officer in command is to be found.

### § 233.

Another mode of intercourse between belligerents is by

#### *Cartels,*

which are agreements entered upon during war, or in anticipation of it, in order to regulate such intercourse as is to be allowed in the course of the struggle. They

#### *Cartels.*

prescribe the formalities to be observed in the exchange of prisoners, the reception of flags of truce, and the interchange of postal or telegraphic communications. Whatever regulations are laid down in them should be observed in good faith, and without any attempt to wrest them from their humane purposes, and turn them into means of obtaining information or gaining military advantage. Cartels for the exchange of prisoners are incidents of all wars between civilized powers, and the arrangements connected therewith are made and supervised by officers called commissaries, who are appointed by each belligerent, and allowed to reside in the country of the enemy. Cartel-ships are vessels employed in the conveyance of prisoners to and from the place of exchange. They are free from hostile seizure on the conditions set forth when we were considering the extent to which public vessels of the enemy are liable to capture.<sup>1</sup>

### § 234.

The next subject to be considered in connection with the relaxations of the strict rule of non-intercourse in warfare may be dealt with under the head of

#### *Passports and Safe-Conducts,*

which can be described as permissions to travel given to subjects of the enemy. Passports are granted by a belliger-

<sup>1</sup> See § 205.

ent government, and are generally made to apply to all territory under its control. Safe-conducts are granted either by a belligerent government or by its naval and military officers. They apply to a particular place only, and any commander may grant them in the area under his control. Both passports and safe-conducts are revocable for good reason; but if they are revoked the grantee should be allowed to withdraw in safety. A limit of time may be named in these instruments, and a special purpose may be mentioned as the only one for which the permission is given. Whatever conditions are imposed must be carefully complied with, and both sides are held to the strictest good faith. A safe-conduct may be given in respect of goods only, in which case it is a permission to remove them without restriction as to the agent, but with an implied condition that he shall not be dangerous or otherwise obnoxious to the grantor. It is always understood that neither passports nor safe-conducts are transferable.

Passports and  
Safe-conducts.

### § 235.

It often happens, especially in maritime hostilities, that a belligerent grants

#### *Licenses to trade,*

which enable their holders to carry on a commerce forbidden by the ordinary laws of war or by the legislation of the grantor. Licenses are *general* when a state gives permission to all its own subjects, or to all neutral or enemy subjects, to trade in particular articles or at particular places, *special* when permission is granted to particular individuals to trade in the manner described by the words of the documents they receive. Both kinds remove all disabilities imposed because of the war upon the trade in respect of which they are given. The holders can sue and be sued in the courts of the grantor, and are allowed

Licenses to trade.

to enter into contractual relations with his subjects to the extent necessary in order to act on the terms of the license. General licenses can be granted only by the supreme power in the state. Special licenses generally emanate from the same source; but officers in chief authority on land or sea can issue permissions to trade in the district or with the force under their command. Such licenses, however, afford no protection outside the limits of the grantor's control. When the commander of an invading force issues a proclamation to the people of the country requesting them to sell him supplies, he gives them an implied license to trade in his camp.

During the war between Great Britain and France at the end of the eighteenth and the beginning of the nineteenth century, a very large number of licenses were granted by both the belligerents. This was especially the case towards the end of the struggle, when Napoleon's attempt to ruin England by excluding her manufactured goods and colonial produce from the continent of Europe had brought about an enormous rise in the price of such commodities in all the countries controlled by him. In 1811 sugar was seven francs a pound in Paris, while in London it cost barely a tenth of that sum, and the price of coffee, raw cotton and indigo in the two places followed about the same proportion.<sup>1</sup> As a natural consequence an enormous system of smuggling arose. Bourienne describes how, at Hamburg, brown sugar was first placed in gravel pits and then passed in carts through the city barriers covered with a thin layer of sand, and how, when this device was found out, hearses were filled with it, till the sudden and remarkable increase in the number of funerals aroused suspicion and led to discovery. We are not surprised, after this, to find the statement that "licenses were procured at a high price by whoever was rich enough to pay for them," or to learn that great and wide-

<sup>1</sup> Rose, article in *Historical Review* for October, 1893, on *Napoleon and English Commerce*.



spread discontent was caused by the prohibition of English goods.<sup>1</sup> If Napoleon had his Berlin and Milan Decrees, Great Britain had her Orders in Council. She too sold or gave licenses in order to mitigate the rigor of her own prohibitions, while unfortunate neutrals, chief among whom was the United States, found their commerce restricted by both sides. Under these circumstances Prize Courts were frequently employed in deciding upon questions of the construction of licenses, and the extent to which the permissions given in them reached. A whole system of jurisprudence grew up with reference to the subject, but most of it is now obsolete. The vast strides made by commerce since the beginning of the century have led to a corresponding increase of its influence on maritime law. The Declaration of Paris laid down, in 1856, that enemy goods not contraband of war might be freely carried on neutral ships; and it is quite certain that in future maritime struggles neutral powers will not again submit to such treatment as they received from France and England in the crisis of their great conflict for commercial supremacy.

It follows from what has just been said that much of the received law of licenses has little more than an antiquarian interest. We will, therefore, pass over its details, and be content to give only those parts of it which may possibly be again enforced. Misrepresentation of facts is held to annul a license, and an individual who has received one by name cannot transfer it to others, though he may act through an agent. But if it is made negotiable by express words, it may be transferred like any other instrument. Slight deviations from the quantity or quality of the goods specified will not forfeit the license, nor will a slight alteration in the character of the vessel; but the use of a ship of one nationality when another was mentioned will cause forfeiture. Deviation from the specified course, or a delay in arrival beyond the specified time, may be excused when caused by

<sup>1</sup> Bourienne, *Memoirs* (Bentley's ed.), II., XXXIII., *et seq.*

stress of weather or some other unavoidable calamity; but delay beyond the time fixed for the commencement of a voyage will not be allowed.

### § 236.

No war of any magnitude is likely to continue long without being marked by one or more

#### *Capitulations,*

which is the name given to agreements for the surrender upon conditions of a fortified place, or a military or naval force. The conditions are set forth in the *Capitulations.* terms of the agreement, and vary from a promise to spare the lives of those who surrender to a grant of "all the honors of war" to the vanquished, a phrase which means that they are allowed to depart unmolested with colors displayed, drums beating and their arms in their hands. It is not often that such ample terms are obtained, nor, on the other hand, does a mere promise to spare life confer any benefit upon the conquered beyond what is theirs already by the laws of modern warfare. Generally the conditions of capitulations range between the two extremes, being lenient or severe according to the nature and extent of the straits to which those who surrender have been reduced, and the degree of necessity the victors are under of ending their operations quickly. Sometimes, too, admiration for an heroic defence will cause more generous terms to be granted than the military situation would enable the beaten side to exact. This was the case at Appomattox, when the remnant of Lee's army surrendered to the Union forces on April 9, 1865, six days after the fall of Richmond and the destruction of the hopes of the Southern Confederacy in the great American Civil War. Grant could certainly have enforced far harsher conditions than the dismissal to their own homes of the foes who, in his own words, "had fought so long and valiantly."<sup>1</sup>

<sup>1</sup> U. S. Grant, *Personal Memoirs*, II., 489.

Every officer in chief command of an army, fleet or fortified post, is competent to enter into a capitulation with regard to the forces or places under his control; but if he makes stipulations affecting other portions of the field of hostilities, they must be ratified by the commander-in-chief before they become valid. Moreover, the ratification of the supreme authorities in the state is required when a commander, supreme or subordinate, makes a capitulation at variance with the terms of his instructions, or includes political conditions among the articles he agrees to. Stipulations in excess of the powers of those who make them are called *Sponsions*, and are null and void unless the principals on each side accept them. In default of such acceptance, an agreement of the kind we are considering has no validity, and all acts done under it must be reversed as far as possible. A good example of a Sponson is to be found in the Capitulation entered into by General Sherman in April, 1865, with General Johnston, the commander of the last Confederate army in the field east of the Mississippi. On condition that the Confederate soldiers should immediately disband and deposit their arms in the arsenals of their respective states, it provided that the state governments which submitted to the Federal authorities were to be recognized, and the people of the Confederacy guaranteed their political rights and franchises as citizens of the Union. These conditions went beyond the sphere of military action, and were clearly in advance of the general's authority, though he had some reason to believe that they would prove acceptable.<sup>1</sup> The government of Washington was, however, guilty of no act of bad faith when it repudiated them.

The much-discussed capitulation of El Arish is an instance of an agreement made by an officer contrary to his instructions, though, as it happened, in ignorance of their terms. The circumstances were most peculiar, and, since accusations of dishonorable behavior have been made on both

<sup>1</sup> W. T. Sherman, *Memoirs*, II., Ch. XXIII.

sides, it is desirable to examine the case and show by a recapitulation of its extraordinary incidents that no breach of good faith took place. On January 24, 1800, the British Admiral, Sir Sidney Smith, signed an agreement with General Kleber, the commander of the French army in Egypt, whereby the forces of France were to evacuate the country and be transported to their own ports with arms, baggage and other property. But in the previous December orders had been sent to Lord Keith, the commander-in-chief in the Mediterranean and the superior officer of Sir Sidney Smith, instructing him not to consent to any terms which did not involve the surrender of the French troops as prisoners of war. The orders based on these instructions did not reach Sir Sidney Smith till February 22, 1800, a month after he had signed a capitulation with Kleber in contravention of them. He immediately informed the French commander of the delicate situation in which he was placed, and stated his intention of endeavoring to induce the home government to ratify the capitulation. Kleber had already restored certain places to the Turks in accordance with its provisions, and when summoned to surrender by Lord Keith, he broke off negotiations and considered the agreement at an end. On resuming hostilities he gained a great victory over the Turks at Heliopolis on March 20, 1800. Before the news of this altered condition of affairs reached England, the British Government had agreed to ratify Sir Sidney Smith's capitulation. But Menou, who succeeded to the command of the French after the assassination of Kleber in June, declined to accept it, and hostilities went on for more than a year longer, when they were terminated by the surrender of the remains of the French army on terms substantially the same as those agreed upon at El Arish. Thus through a strange combination of untoward circumstances first one side and then the other refused to be bound by an agreement which both had signed, and that without any just suspicion of bad faith attaching to either.<sup>1</sup>

<sup>1</sup> Fyffe, *Modern Europe*, I., 224-227; Dyer, *Modern Europe*, IV., 353-354.

## § 237.

Lastly we must give a brief outline of the law of

*Truces and Armistices.*

They are temporary suspensions of hostilities over the whole or a portion of the field of warfare. There is some difference of opinion and usage as to the terms to be applied to them. An agreement to cease from <sup>Truces and Armistices.</sup> active operations within a limited area, for a short time, and with the object of carrying out a definite purpose such as the burial of the dead, is generally called a *Suspension of Arms*, but it is also, and with equal propriety, termed an *Armistice*, the latter being the English usage.<sup>1</sup> A similar agreement, extending over a very long period and applying to the whole field of warfare, goes invariably by the name of a *Truce*. It amounts in fact to a peace, except that no treaty is drawn up. Such lengthy cessations of hostilities are unknown in modern warfare, but operations are often suspended for a time in order that negotiations may take place between the belligerents, either for a definite peace or for the surrender of some place or force, and these rifts in the clouds of war are called indifferently *Truces* or *Armistices*. The chief, if not the only distinction between them, appears to be that the former is an older word than the latter, which has come into general use within the last hundred and fifty years. Every commander has power to conclude an armistice with respect to the forces and places under his immediate control, but a general armistice covering the whole field of hostilities can be made only by the supreme power in the state.

The agreement for an armistice should contain a clear announcement of the exact time when it begins and ends. As a rule the terms of these instruments are precise, but in

<sup>1</sup> Speeches of Generals Voigts-Rhetz, de Schönfeld and Horsford at the Brussels Conference of 1874; see British State Papers, *Miscellaneous*, No. 1 (1875), p. 209.

default of definite stipulations on various points we may extract a certain amount of guidance from the general rules of International Law. They lay down that as soon as an armistice is concluded it should be notified to all concerned, and add that if no definite time has been fixed for the suspension of hostilities, they cease immediately after the notification. If the duration of the armistice has not been agreed upon, either belligerent may resume operations at any moment, provided that he gives clear and sufficient notice to his foe. Moreover, when one side violates the armistice, the other has the right of terminating it; but in such a case notice should be given to the offending party in order to afford him an opportunity for explanation and reparation. If, however, the breach of the conditions agreed upon is the act of unauthorized individuals, the side which suffers has no right to bring the arrangement to an end, but it may demand the punishment of the guilty parties and an indemnity for any losses it has sustained.<sup>1</sup>

It is universally agreed that during an armistice a belligerent may do in the actual theatre of war only such things as the enemy could not have prevented him from doing at the moment when active hostilities ceased. Thus a besieged garrison may not repair a breach commanded by the enemy's artillery, but they may build an inner defence out of the range of his guns. Beyond the zone of active operations the parties may perform what acts of naval and military preparation they please. They can fit out ships, move troops, recruit armies, and, in short, act as if hostilities were still going on. There is, however, a dispute about the re-victualling of a besieged place. The fairest plan would be to allow it to be supplied for a few days at a time under the supervision of the besiegers. But as a rule they are the stronger party and dictate their own terms, as the Germans did in 1871, when they would not allow Paris to receive any supplies during the armistice which preceded its surrender.

<sup>1</sup> *Projected Brussels Code, Arts. 47-52.*

## CHAPTER VIII.

### PEACE AND THE MEANS OF PRESERVING PEACE.

#### § 238.

WAR between civilized states is almost invariably ended by a treaty of peace. It has sometimes happened that the belligerents have exhausted themselves and tacitly ceased from further operations, but there are no recent instances of such a termination to hostilities. They may come to an end through the destruction of one of the communities engaged in them, as Poland was destroyed by the Third Partition, or as the Southern Confederacy fell after four years of strenuous warfare. In such cases no treaty is possible because there is no body politic left for the victor to treat with. But when each of the belligerents preserves its political identity after the war, a treaty is drawn up embodying the conditions of peace. As a rule it settles all the matters in dispute between the belligerents. But sometimes the difficulties of a settlement prove insuperable, and the parties content themselves with providing for the restoration of peace and amity. This was the case with Great Britain and the United States in 1814, when the Treaty of Ghent terminated the war between them without solving any of the difficult questions which had originally caused it. Such a curious combination of a strong desire to terminate the struggle with an equally strong inability to agree upon a settlement of the points at issue is very rare. Generally the causes of the quarrel are dealt with in the instrument which restores peace, and it

War is generally terminated by a treaty of peace.

contains in addition various stipulations concerning the new order of things which is to follow the termination of hostilities. Private rights are safeguarded, provision is made for the resumption of commercial intercourse, and legal matters of an international character receive due attention.

### § 239.

The restoration of a state of peace carries with it certain consequences defined by International Law, and not dependent for their existence upon treaty stipulations, though they may be modified or set aside thereby. The moment a treaty of peace is signed, belligerent rights cease. There must be no more fighting. Requisitions and contributions can be no longer levied by an occupying army, and arrears of them remaining unpaid cannot be demanded. The right to detain prisoners of war as such ceases, though convenience dictates that they shall remain under supervision till proper arrangements can be made for their return home. When the area of warfare is very large, and portions of it are too remote to be reached by quick modes of communication, it is usual to fix in the treaty a future date for the cessation of hostilities in those distant parts. But if official news of the restoration of peace reaches them before the time fixed, it seems to be settled that no further acts of war may be committed. The notification must, however, come from the government of a belligerent in order to be binding upon its commanders. They are under no obligation to take notice of information derived from any other source. This was clearly laid down by the French Council of Prizes in the case of the *Swine-herd*, a British ship captured in the Indian Ocean in 1801, within the five months fixed by the Treaty of Amiens for the termination of hostilities in those regions, but after the French privateer which made the capture had received news of the peace. The information was, however, English and

The legal consequences of the restoration of peace.



Portuguese in its sources. No notification of an official character had been received from France, and the capture was therefore adjudged to be legal.<sup>1</sup> Captures made in ignorance after the conclusion of peace, or after the time fixed in the treaty for the termination of hostilities, must be restored, and the effects of all acts of war performed under similar circumstances must be undone as far as possible.

At the conclusion of peace private rights suspended during the war are revived. Thus debts due from subjects of one of the powers lately belligerent to subjects of the other can again be sued for, and contracts made before the war between private individuals on opposite sides in the struggle can be enforced at law. But specific performance cannot be demanded if any act done in furtherance of warlike operations, or as an incident of them, has rendered it impossible. A man, for instance, cannot be compelled to fulfil an agreement to sell a particular house or a particular herd of cattle, if the house has been battered to pieces in a siege or the cattle requisitioned and eaten by the enemy. When a period is put to legal obligations, the time does not run during the continuance of hostilities. Let us take as an example the payment of a debt, the recovery of which is barred after seven years by a statute of limitations. It could be enforced at the end of a war, provided that less than seven years had elapsed between the time when it was contracted and the outbreak of hostilities, and it could also be enforced at any subsequent period, provided that the time between the signature of the peace and the commencement of the action added to the time between the incurring of the debt and the war did not exceed seven years.

As between the belligerent powers themselves, it is held that the conclusion of peace legalizes the state of possession existing at the moment, unless special stipulations to the contrary are contained in the treaty. This is called the

<sup>1</sup> Kent, *Commentaries on American Law*, I., § 172, note b ; Pitt Cobbett, *Leading Cases in International Law*, p. 150.

principle of *uti possidetis*, and it is of very wide and far reaching application.<sup>1</sup> Cities, districts and provinces held in belligerent occupation by an enemy fall to him by the title of completed conquest, when it is not expressly stated that they are to be evacuated. Captures made at sea but not yet condemned by a Prize Court become the lawful possessions of the captor, and seizures on land of such things as a belligerent is allowed by the laws of war to appropriate are his by good title. It is very rarely desired that all these consequences should follow the conclusion of peace. The victor does not wish to acquire in perpetuity every post he holds when hostilities cease, nor does the vanquished intend to give up whatever territory may be at the moment in the hands of his adversary. Accordingly when one side has overrun large districts and captured many places, the treaty of peace almost invariably contains elaborate stipulations with regard to them. Their future destination is settled by express agreement, and detailed provisions are made for the regulation of proprietary and personal rights and obligations. Arrangements that seem at first sight to be pedantic in their minuteness are often necessary to carry out the intentions of the parties in the face of the rule that, when there are no express stipulations to the contrary, the principle of *uti possidetis* prevails.

### § 240.

Among the most extraordinary phenomena of modern times we may reckon the simultaneous growth of the material preparations for warfare and a sentiment of horror and reprobation of war. Both are apparent all over the civilized world. The feeling in favor of peace is strongest in the two great English-speaking nations; but even they have added considerably to their fighting forces, while the other leading states of the

The simultaneous growth of a horror of war and preparations for war.

<sup>1</sup> Wheaton, *International Law* (Dana's ed.), § 548.

civilized world have imposed crushing burdens on their manhood and their wealth, in their anxiety to bring themselves to the highest point of efficiency in defence and attack. The United States has been untouched by any desire to imitate the military armaments of the continent of Europe, but she has created within recent years a navy of modern war-ships, which she is steadily enlarging with the consent of both her great political parties. Great Britain has done little for the improvement of her army except increase its cost; but she has made and is making enormous additions to her fleet. On the other hand, a strong dislike of war is growing among the nations who are most energetic in strengthening their fighting forces. Throughout Europe there is a stirring among both rulers and peoples. Those who preach the doctrine that war is essential to manliness and self-sacrifice are not accorded the almost universal approbation which would have been granted them a few years ago. Thoughtful men and women are not disposed to traverse the statement that the exclusive pursuit of wealth and material comfort is debasing and dangerous. They are willing to admit the argument of Von Moltke that knowledge alone will not inspire patriots to give their lives for home and fatherland. But they do most strongly controvert the terrible conclusion which the great German strategist drew from his innocent premises. They cannot believe that eternal peace is a dream, and not even a beautiful dream. They would account it blasphemy to hold that war is a part of the divine order of the world. They see in England a nation in which the physical perfection of manhood is often attained by healthy sports and outdoor exercises, without compulsory military service. They look across the Atlantic and find another people among whom intense patriotism and a most jealous regard for the honor of the flag is kept alive without the existence of a standing army of sufficient size to be a calculable factor in the national life. All around them are the devotees of religion and philanthropy, the idealists of science

and art, in whose bosoms love of God and man, or enthusiasm for truth and beauty, has kindled the most heroic self-sacrifice. While there are new countries to be explored, new tracts to be reclaimed from wilderness and tamed for the service of man, there will never be lacking an ample field for the utmost energy of the restless and the adventurous. While there are seas to be crossed and mountains to be climbed, skill and daring will be in constant demand. The fireman in the burning building is as brave as the soldier in the breach. The miner in his underground galleries has as much need of coolness and courage as the engineer in the trenches. Domestic life gives a far better training in self-control and self-denial than the camp or the battle-field. Obedience and discipline are qualities necessary for the successful pursuit of countless manufacturing industries. Loyalty to comrades is developed by engaging with others in the work of many a civic and religious organization. The destruction and waste caused by war, the passions it stirs up, and the suffering and vice which follow in its train, are a terrible price to pay for noble qualities that may be gained by other means. Men can be manly without periodical resort to the occupation of mutual slaughter. It is not necessary to graduate in the school of arms in order to learn the hard lessons of duty and honor and self-sacrifice.

In the past war has often been a game which kings have played at in the interests of personal or dynastic ambitions. With the advance of democracy it is becoming more and more a matter for peoples to decide upon. They are hardly likely to engage in it deliberately after cool calculation as a mere move in a deep political scheme, but they may be easily led into it through ignorance, or driven into it through resentment and fury. The best hope for the future lies in their enlightenment as to their true interests, and their moral improvement to the point of regarding every unnecessary conflict as at once a blunder and a crime. If wars there must be, let them at least be wars of reason, and not wars of passion.

It is not to be wondered at that those who can read the signs of the times should stand aghast at the spectacle now presented by the continent of Europe. The powers of the Triple Alliance — Germany, Austria, and Italy — have 1,136,000 soldiers with the colors, and in the last extremity can place in the field about 10,000,000 men. France and Russia, who are allied to keep them in check, command together a force of 1,387,000 trained troops on a peace footing, and when their last reserves are called out would have about 7,000,000 men under arms.<sup>1</sup> These are paper estimates, but, after making all possible deductions from them, it seems clear that five states only could hurl at each other vast masses of soldiery numbering in the aggregate twelve million souls. These figures take no account of the armies of the smaller states or the navies of the maritime powers. If we make a reasonable addition for them, we arrive at the startling conclusion that in a time of universal peace Europe takes three million men from productive occupations, quarters them upon the industry of those who remain, and trains them in all the arts of destruction, while in a general war the enormous number of sixteen million soldiers in a more or less organized condition would be available to fill the ranks of the armies. Civilization cannot long endure such a burden, and indeed, the European military system already shows signs of breaking down under its own weight. Greece is bankrupt; Italy, Spain and Portugal are tottering on the verge of bankruptcy; Germany has the greatest difficulty in finding the means to pay for her recently increased armaments; Austria, Russia and France struggle on with increased estimates and increasing debts. Nor is this all. An army may be an excellent school of honor and discipline, but it may be also a school of vice, too often state-established and state-endowed. It defers, if it does not prevent entirely, healthy family relations. It tends to produce a distaste for the comparatively unexciting avocations of civil life; and

<sup>1</sup> See figures in *Statesman's Year Book for 1894*.

while it generally improves physique, it too often causes a deterioration of those mental and moral qualities which make an increase of bodily vigor a blessing and not a curse. The good effects of the existing system can be obtained by other means, but the evils it intensifies would be greatly diminished by its destruction or abatement. Men of light and leading are crying out everywhere against it. Not only are the "peace societies" more active and influential than they have ever been before, but statesmen and thinkers who do not believe in the possibility of the abolition of war are endeavoring to bring to an end the present state of armed peace, which is only one degree less burdensome than war itself. We hear every day rumors of proposals for a general disarmament made by crowned heads. The Pope is begged to exercise his vast influence in this direction. Men speak of a truce for ten years, believing that if the nations had that period of freedom from war burdens they would never consent to bear them again. An aged French statesman has just come forward to suggest that the period of military service be reduced by general agreement to one year only.<sup>1</sup> The air is thick with proposals, some visionary, some intensely practical. Advanced politicians base large hopes of future peace upon the growing solidarity of labor all over the world. Sanguine philanthropists can see but little difficulty in their own particular schemes for establishing a Supreme Court of International Appeal. Ardent missionaries of brotherhood and good-will are endeavoring to league together in the bonds of peaceful fellowship the student youth of civilized mankind. Great divines and preachers are awaking the Church to her duty of warring against war.

#### § 241.

It is not desirable to discuss at length the various proposals alluded to in the preceding section. To deal with them

<sup>1</sup> M. Jules Simon, article in *Contemporary Review* for May, 1894.

fully would require a volume, and would be foreign to the purpose of a book which purports to set forth the rules of International Law as they are. Yet the writer of such a work may be pardoned if he steps aside for a few moments from the beaten track, and endeavors to point out to his readers what seems to him the best and most feasible way of helping to diminish the horrors of war. Certain it is that if he errs in so doing, he errs in good company. The great founders of our modern system of international relations were as much moralists as jurists. Indeed, the two capacities were to their minds inseparable; and though it may be true that their works lacked precision in consequence, it is also true that the high ideal set up by them had no small influence in humanizing the laws of war and introducing justice into the ordinary intercourse of states.

Remedies for war.  
Arbitration the  
most hopeful.

We have seen that the ferocity of ancient and mediæval warfare has been gradually mitigated and that further mitigations may be hoped for in the immediate future. Obviously it is the duty of all who desire an advance in the directions indicated to use their influence as citizens in favor of the projected reforms. But side by side with the process of measuring the severities permissible in war by the necessities of the case, and not by the passions or greed of the combatants, has gone on another process which reduces the area within which hostilities are allowed. This is done by what is called Neutralization. To neutralize is "to bestow by convention a neutral character upon states, persons and things which would or might otherwise bear a belligerent character."<sup>1</sup> It is a comparatively modern device, no clear instances of it being found before the present century. In 1815, Switzerland was neutralized by the Great Powers, who guaranteed its integrity and inviolability within the limits established by the Congress of Vienna. Belgium was placed in the same position by the treaties of 1831 and 1839,

<sup>1</sup> Professor Holland, article in the *Fortnightly Review* for July, 1883.

and Luxemburg in 1867. These states are bound to make no war except for the purpose of defending their own territory from actual attack, and the Great Powers are bound neither to attack them nor to allow any other power to do so. Their territory is thus fenced off from the field of possible hostilities, which is lessened in area by its extent. They afford the best examples of neutralization, but not the only ones. Other instances will be dealt with when we come to speak of the Law of Neutrality.<sup>1</sup> Here it is sufficient to say that, when a territory is neutralized in reality as well as in name, an advance has been made towards the distant goal of perpetual peace. But great caution must be used in all attempts to extend the operation to fresh tracts of land or sea. It depends for its successful application upon the existence of a state of mind among the rulers and peoples concerned, which shall make them willing not only to respect the guarantee of neutrality themselves, but also to enforce it against others. Unless it is well understood that the neutralized state will be aided to maintain its neutrality by powerful friends, ambition and self-interest will sooner or later impel some neighbors to seize upon its territory. It is wise to press for neutralization when the political conditions are favorable; but indiscriminate attempts to neutralize can only bring discredit upon what is, when rightly employed, a valuable means of diminishing the evils of war by diminishing the area within which they can be inflicted.

We cannot, however, expect any very rapid spread of the process of neutralization. It is inapplicable to great and important powers, which are conscious of having a prominent part to play in the world, and would not consent to any restriction upon their freedom of action in playing it. But there is another means of abating war, which is much less limited in its scope. It applies as well to the strongest as to the weakest states, and has within itself the capacity of being developed into a far more efficient instrument of in-

<sup>1</sup> See §§ 245-247



ternational justice and concord than it is in its present imperfect condition. We refer, of course, to Arbitration, which may be defined as the submission of matters disputed between states to the judgment of one or more impartial persons, whose decision the parties have expressly or tacitly consented to accept. It is impossible to say with precision how many questions have been settled in this manner. To obtain absolutely correct figures would involve the labor of a lifetime, and an examination of the archives of all the nations of the world. But it is certain that Arbitrations have been much more frequent during the present century than ever before, and have increased in number and importance as the decades rolled on. At least sixty instances can be found since 1815, and to thirty-two of these the United States was a party, while Great Britain comes next with twenty.<sup>1</sup> This is a good record for the English-speaking peoples; and it becomes better when we remember that the greatest questions submitted to Arbitration have been questions between the two states which divide the political allegiance of the Anglo-Saxon race. In 1872 the Alabama claims<sup>2</sup> were adjudicated upon by a board of arbitrators sitting at Geneva, and in 1893 the Bering Sea question<sup>3</sup> was decided by a similar tribunal, which assembled at Paris. These were important matters, either of which might have led to war had it been injudiciously handled. The first was especially dangerous. The questions in dispute had been discussed for years in a keen and sometimes not over-friendly controversy, and had evoked a large amount of popular passion on both sides of the Atlantic. The second did not excite so much feeling; but more than once the means used to enforce conflicting claims came within measurable distance of producing an armed collision which might have plunged the two countries into war. Fortunately, calm

<sup>1</sup> These figures are based upon information published by the Peace Society in a short pamphlet called *The Proved Practicability of International Arbitration*.

<sup>2</sup> See §§ 261-263.

<sup>3</sup> See § 106.

counsel took the place of hot-headed violence, the dispute was referred to impartial judgment, and the United States accepted an award against its claims with as much loyalty as Great Britain showed under a similar disappointment twenty-one years before. Men wonder now how it was possible for two kindred nations to work themselves up to the verge of a fratricidal war over the question whether one of them was liable in damages for the escape from its ports of a few cruisers to prey upon the commerce of the other. And already we have begun to wonder why it was that some of us seemed prepared to let a quarrel over a seal-fishery develop into an armed struggle, in the course of which it is pretty certain that the seal-herd itself would have been exterminated. Both these matters were eminently fitted for Arbitration. They were not concerned with national existence or national honor. They were what we may call business disputes, which could be settled in either way without affecting the position of the losing party in the family of nations. But they were by no means trivial. Many a war has taken place over matters of far less moment. The attention of the civilized world was directed to them; and the example of their peaceful solution cannot fail to be of good effect.

### § 242.

The United States and Great Britain have conferred a benefit upon humanity by referring to Arbitration many of their disputes, and notably the two important ones to which we have just alluded. It remains for them to do a greater service still by agreeing beforehand upon the constitution of a tribunal to deal with all the difficulties arising between them which may prove too hard for diplomacy to solve. Considered as a means of settling international disputes, Arbitration has two great defects. On each occasion the Arbitral Tribunal must be constituted *ad hoc* by agreement between

All disputes between the United States and Great Britain might be submitted to Arbitration.

parties already heated by controversy, and when it has been constituted, and has given its decision, there is no force behind it to compel submission to the award, should either side or both prove recalcitrant. The latter flaw cannot be remedied till a further step has been taken in the development of international relations, and meanwhile we can only trust to the moral feeling which renders it difficult for a self-respecting state to refuse to act upon a judgment which it has pledged itself beforehand to accept. But the former can be effectually removed without organic changes for which states are not yet prepared. Nothing more is needed than a treaty containing two clauses, the first of which shall stipulate for a reference to Arbitration of every dispute that cannot be settled by negotiation, and the second shall provide that in every case of Arbitration the tribunal shall be constituted of so many members nominated in fixed proportions by the contracting parties and other states mentioned by name. Public opinion in England and America is ripe for such a treaty. The old irritation has been largely soothed by former Arbitrations. Events have drawn and are drawing the two countries closer and closer together, and the more they know of each other the clearer is their perception of the fact that race and religion and political institutions form between them a bond such as exists between no other nations on the face of the earth. Their essential interests are not divergent. Such unsettled questions as arise to vex their mutual good-will are capable of adjustment without serious friction. The exact distance to which a Maine fishing schooner may penetrate in a Nova Scotian Bay is a matter of some importance to powerful trading interests; but it is hardly of sufficient moment to threaten the very life of the United States or the British Empire. Nor is the honor of the flag affected by differences as to the precise height to which it is desirable to build up or lower the tariff wall between the Northern States and Canada. War will probably remain for generations to come the only method of solv-

ing disputes which in the opinion of those concerned involve the national existence or the national honor. We may hope to minimize the number of such questions, and to secure that they shall be judged more dispassionately than heretofore. But in the case of Great Britain and the United States we start with the initial advantage that they are not likely to arise at all. Circumstances point to these two powers as the best fitted of any to lead the way in a great international experiment, which, if it is successful, will do more for the cause of peace than any single event since the beginning of the Christian dispensation. Already Congress and Parliament have done their part. In 1890 the Senate and the House of Representatives adopted a concurrent resolution requesting the President to make use of any fit occasion to enter into negotiations with other governments "to the end that any differences or disputes . . . which cannot be adjusted by diplomatic agency may be referred to Arbitration and peaceably adjusted by such means." The good work thus begun was taken up by the British House of Commons. On June 16, 1893, it passed by a unanimous vote a resolution expressing the satisfaction with which its members had learned of the action of Congress, and "the hope that Her Majesty's Government will lend their ready co-operation to the Government of the United States" in any attempt to carry out as between the two countries the purpose of the American suggestion. President Cleveland has officially conveyed to Congress the resolution of the House of Commons with an expression of his "sincere gratification that the sentiment of two great and kindred nations is thus authoritatively manifested in favor of the rational and peaceful settlement of international quarrels by honorable resort to arbitration." Thus the matter stands at present.<sup>1</sup> It only remains for the diplomatists to draw up the treaty and the peoples to insist that it shall be duly negotiated, signed, ratified and acted upon.<sup>2</sup>

<sup>1</sup> See *Concord* for January, 1894, pp. 8, 9.

<sup>2</sup> Since the text was written the governments of the two countries have negotiated an elaborate treaty, providing for the classification of disputes and their reference to Arbitral Tribunals variously constituted according to

The resources of diplomacy are by no means unequal to the task thus set before it. As every war is an evidence of its failure, so every Arbitration is a sign of its success. Even if higher motives were altogether absent, which is certainly not the case, professional feeling would make diplomatists zealous for the peaceful solution of international difficulties. For more than ten years past they have been in the habit of introducing into treaties of commerce stipulations binding the contracting parties to arbitrate upon any disputes that might arise out of their provisions, and the Swiss Government has more than once pressed upon the United States the desirability of an agreement to refer all disputes, commercial or otherwise, to Arbitration, when they cannot be settled in the course of ordinary negotiations. Such a treaty between Great Britain and the United States would have an enormous effect, especially if it provided beforehand for the constitution of the Arbitral Tribunal. Without the slightest wish to belittle other countries, we may say in sober truth that these two nations are marked out for empire by the extent of their dominions, the freedom of their institutions, and the energy and governing ability of their people. The assurance of continual peace between them means that the war-demon is exorcised from a large and rapidly increasing portion of the human race. Their Arbitral Tribunal will in time develop into a Permanent Court, and the Permanent Court will soon come to possess a permanent code. Other nations, burdened almost beyond endurance by military and naval armaments, will follow in their footsteps. First they will adopt the method of Arbitration in a steadily increasing number of instances. Then they will regard their war preparations as too heavy an insurance against evils less and less likely to occur, and will refuse to bear the strain of them any longer. They, too, will then be ready for their Permanent Court, and for the general disarmament which will release the springs of industry, and abolish the hated blood-tax. From a number of Courts with jurisdiction over

the class of cases they were to decide. But unfortunately, in the spring of 1897, the Senate of the United States refused to ratify the treaty.

groups of states, one great Court with jurisdiction over civilized humanity may at length spring, and when it comes into being means will be found to arm it with a force which shall compel obedience to its decisions. The evolution of perpetual peace must go on by slow degrees. We cannot hope to see the time when war will be but a dim memory of an uncouth past. Yet we can bring it nearer by persistent effort to help on the cause of international brotherhood in our own day and generation. With the opportunity before us of binding together the two great branches of the English-speaking people in a permanent league of amity and goodwill, we have only to do our plain and simple duty and we shall not have lived in vain.

## PART IV.

### THE LAW OF NEUTRALITY.



#### CHAPTER I.

##### THE NATURE AND HISTORY OF NEUTRALITY.

##### § 243.

NEUTRALITY may be defined as *The condition of those states which in time of war take no part in the contest, but continue pacific intercourse with the belligerents.*

The definition of Neutrality. The varied elements which have gone to form its law.

The Law of Neutrality contains some of the oldest and some of the youngest chapters of our science. We have in it rules that have been observed for ages, and rules that have been developed in our own time. Some of its customs have gained authority from long usage, and some are even now shifting and uncertain. It sets forth principles that have been consecrated by general assent, and principles that are still warmly debated and fiercely decried. High ethical considerations have moulded some parts of it, while others have arisen from the conflict of opposing self-interests. Starting from small beginnings it has grown with the growth of the idea that peace and not war is the normal condition of mankind, till now it forms the most important, if not the largest, title of the interna-

tional code. He who reads its pages aright will find therein the proof that, by making war difficult and neutrality easy, nations may be led to take that "true road to a perpetual peace"<sup>1</sup> which all lovers of humanity desire to see them tread.

Neutrality is in a sense the continuation of a previously existing state. By going to war belligerents alter their condition; but the powers who choose to be neutral remain as they were before. It might be thought, therefore, that their international rights were unchanged; and so far is this the case that the legal presumption is in favor of identity and continuity. Unless proof to the contrary is shown, neutral states and their subjects are free to do in time of war between other states what they were free to do in time of universal peace. But International Law has affixed to the state of neutrality certain rights and obligations which do not exist when there is no war. Neutral governments may regulate the delivery of certain articles to belligerent cruisers enjoying the hospitality of their ports. The supply of certain other articles they are bound to prohibit altogether. They have the right to enforce respect for the neutrality of their waters, and they are under an obligation not to allow their territory to be used for the fitting out or recruitment of armed expeditions in favor of either belligerent. Similarly the commerce of neutral individuals with the belligerents is subject to certain restrictions which do not exist in time of peace, and if they are disregarded the neutral trader is liable to severe penalties at the hand of the belligerent who suffers by his operations. These are but examples and indications of the altered legal conditions brought about by war even in the case of those who take no part in it. The whole Law of Neutrality is nothing more than the setting forth of the changes alluded to; but throughout it there runs the principle that every restriction upon the activities that were lawful to neutrals in the previous state

<sup>1</sup> Whewell, *Elements of Morality and Polity*, p. 611.



of general peace must rest upon clear and undoubted rule. The burden of proof lies upon those who would enforce the restraint. The presumption is in favor of the continuation of former liberty. This may be regarded as the undoubted doctrine of modern times, though its acceptance cannot be dated much farther back than the end of the eighteenth century. Till then belligerents were on the whole more powerful than neutrals, and were able to carry on their wars with slight regard to the sanctity of neutral territory or the convenience of neutral commerce.

### § 244.

The nations of classical antiquity had no names to signify what we mean by neutrality. The Romans spoke of neutrals as *medii*, *amici* or *pacati*; and their vocabulary remained in use all through the Middle Ages. Grotius in the one short chapter which he gives to the matter refers to *medii*<sup>1</sup> and Bynkershoek is obliged to coin the awkward phrase *non-hostes* when he wishes to be exact.<sup>2</sup> In the seventeenth century the terms *neutral* and *neutrality* occur in a Latin and a German dress as well as in English,<sup>3</sup> but they had to be adopted into the French language before their use became general. Vattel, writing in 1758, spoke of *neutre* and *neutralité*; <sup>The history of Neutrality.</sup><sup>4</sup> and in the following year Hübner published his *De la Saisie des Bâtements Neutres*. From that time the words became technical terms, and were used by all writers and speakers upon the department of International Law, with which we are now concerned.

It might be inferred from the absence of a proper vocabulary of neutrality in the works of the early publicists that

<sup>1</sup> *De Jure Belli ac Pacis*, III., XVII., iii.

<sup>2</sup> *Quæstiones Juris Publici*, I., 9.

<sup>3</sup> Holland, Article on the *International Position of the Suez Canal* in the *Fortnightly Review* for July, 1883.

<sup>4</sup> *Droit des Gens*, III., Ch. vii.

the thing itself was either unknown to them entirely or existed in a very rudimentary condition. The truth is that the Law of Neutrality is a comparatively modern growth, in so far as it deals with the mutual rights and duties of belligerent and neutral states. It has arisen during the last three centuries from a recognition, dim at first but growing clearer and clearer as time went on, of the two principles of absolute impartiality on the part of neutrals and absolute respect for neutral sovereignty on the part of belligerents. But in so far as it deals with the right of belligerent states to put restraint on the commerce of neutral individuals, it is at least as old as the maritime codes of the Middle Ages, and in some of its provisions traces can be found of the sea laws of the Greeks and the Romans.<sup>1</sup> Opposing self-interests are the operative forces which have determined the character of this part of the Law of Neutrality. At first the powers at war were able to impose hard conditions upon peaceful merchants. It was a favor for them to be allowed to trade at all, and they were not permitted to do anything that would impede the operations of the belligerents. Then, as commerce became stronger, concession after concession was won for neutral traders; and neutral states made common cause to protect their subjects from molestations they deemed unwarrantable. The nineteenth century has seen the removal of many of the remaining shackles, and it can hardly be doubted that others will soon be struck off. The nature of the process will be seen when we come to speak in detail of the rules of maritime capture as they affect neutral commerce. Meanwhile we will briefly trace the growth of a Law of Neutrality, as between the states concerned in the war and the states which hold aloof from it.

Two writers so utterly unlike in principles and modes of thought as Machiavelli and Grotius are at one in assuming that the condition of neutrality is difficult and dangerous. But here their agreement ends. The Florentine statesman

<sup>1</sup> Pardessus, *Us et Coutumes de la Mer*, Vol. I.

characteristically advises that the ideal Prince should never be neutral in wars between his neighbors, since it is always more advantageous to take part in the struggle. He argues that, when there is reason to fear whichever of the belligerents happens to become the conqueror, it is wise to take up arms on one side or the other, because, if you do not, "you are certain to become the prey of the victor to the satisfaction and delight of the vanquished." If on the other hand neither party to the struggle can give you cause for fear, "it is all the more prudent for you to take a side, for you will then be ruining the one with the help of the other, who, were he wise, would endeavor to save him. If he whom you help conquers, he remains in your power, and with your aid he cannot but conquer."<sup>1</sup> It is needless to say that the great Dutch jurist does not treat the problems of neutrality in this cynical way. But his endeavor to apply moral principles to their solution shows by its palpable imperfections how new was the task he attempted. He makes the neutral state into the judge of the justice or injustice of the war, and bids it "do nothing which may strengthen the side which has the worse cause, or which may impede the motions of him who is carrying on a just war." Only in "a doubtful case" is it exhorted "to act alike to both sides."<sup>2</sup> Where modern International Law insists on impartiality of conduct Grotius makes inequality of treatment a duty. He would determine a neutral's action by its views as to the rights and wrongs of the quarrel; whereas the approved doctrine of recent publicists is that the opinions and sympathies of non-combatant powers should have no effect on their behavior. They are bound to hold the balance equal between the parties to the conflict, however strongly they may desire the success of one of them and the defeat of the other. Neutral duties towards belligerents have grown

<sup>1</sup> *The Prince*, Ch. XXI. The quotations in the text are from the translation by N. H. T., published by Kegan, Paul & Co.

<sup>2</sup> *De Jure Belli ac Pacis*, III., XVII., iii.

enormously since the time of Grotius, and their development has not taken place along the exact lines laid down by him. A similar growth is observable in the corresponding department of belligerent duties towards neutrals. We must be content with a very brief survey of both processes.

Up to the middle of the seventeenth century it was necessary to bind states to neutrality by special treaty stipulations, in the absence of which a so-called neutral allowed one or the other of the belligerents to levy troops and fit out ships within its dominions, and sometimes furnished him with stores and munitions of war at the public expense.<sup>1</sup> After that time it began to be admitted that neutrality involved abstinence from open aid or encouragement to either belligerent. But an exception was made in the case of solemn promises of assistance made before the war. Grotius had gone so far as to declare that, even when two states were bound by a league, one of them might defend a third power from the attack of its ally without a general breach of the peace between them.<sup>2</sup> But the accepted doctrine of the eighteenth century was not quite so broad. It laid down in the words of Vattel that "when a sovereign furnishes the succor due in virtue of a former defensive alliance, he does not associate himself in the war. Therefore he may fulfil his engagements and yet preserve an exact neutrality." The Swiss publicist goes on to say that "of this Europe affords frequent instances," and it is easy to collect a number of cases more than sufficient to make good his assertion. He himself refers to the action of the Dutch, who in the war of the Austrian Succession furnished Maria Theresa with subsidies and troops for use against France, with whom they remained at peace; and as this assistance was given under the provisions of a treaty made before the war and not in contemplation of it, the French Government did not complain until the forces of the United Provinces threatened its Alsa-

<sup>1</sup> Hall, *International Law*, § 208.

<sup>2</sup> *De Jure Belli ac Pacis*, II., XVI., xlii.

tian frontier.<sup>1</sup> When such a definite and important state act as the despatch of fleets and armies was not held to be inconsistent with neutrality, we may well imagine that the lesser concessions of permission to levy recruits or purchase and equip vessels of war were deemed perfectly innocent. Very often indeed leave was taken without the ceremony of asking for it, as, for instance, by Frederick the Great, who in the Seven Years' War cared not where he obtained his soldiers as long as the ranks were full. But towards the close of the century moral ideas outran practice, and writers who were abreast of the best opinion of their day began to condemn the license of which we have been speaking. Thus G. F. de Martens maintained that a state which sent troops to assist one of the belligerents could not in strictness demand to be looked upon as a neutral, though he allows that it would be generally regarded as such when the treaty under which it gave the aid was made before the war.<sup>2</sup> The year in which he wrote witnessed the last example of the practice he condemned. In 1788 Denmark furnished limited succor to Russia, then at war with Sweden. Though she was bound by previously existing treaties to do so, her conduct was made the subject of protest by the power which suffered in consequence of it, and had not the war been brought to a speedy termination, she would probably have been made a party to it.<sup>3</sup>

When neutrals were allowed to ignore in act the principle of impartiality they loudly asserted in words, it is not to be wondered at that the obligation to respect the sovereignty and territorial integrity of neutral states sat lightly upon belligerent powers. The elementary duty of refraining from hostile operations in neutral territory was frequently violated. Grotius admits that many liberties were often taken

<sup>1</sup> *Droit des Gens*, III., §§ 101, 105.

<sup>2</sup> *Précis du Droit des Gens Moderne*, §§ 264, 265.

<sup>3</sup> Wheaton, *International Law*, § 424; Phillimore, *International Law*, Pt. IX., Ch. ix.

with those who refrained from engaging in a war, and advises them to make a convention with each of the belligerents so that they may be allowed with the good-will of both to abstain from hostilities.<sup>1</sup> Indeed there seems to have been an idea abroad during his time that a neutral state must be either weak or mean-spirited. In the first case its territory might be violated with safety, and in the second it was deemed to have received a useful lesson when a powerful neighbor made it suffer in spite of its determination to incur no risks. Certain it is that violations of neutral territory on the part of belligerents were of constant occurrence.<sup>2</sup> In 1689, for instance, a Spanish fleet was destroyed in the Downs, which are English territorial waters, by the Dutch admiral Tromp, after negotiations which did little honor to the good faith of Charles I.,<sup>3</sup> and in 1665 the English returned the compliment by attempting to seize a Dutch squadron in the neutral harbor of Bergen. It is generally alleged, and probably with truth, that a considerable improvement took place in the next century; but we must not forget that one of the greatest of its writers endeavored to introduce into the international code an exception to what had hitherto been regarded as the undoubted principle of the sanctity of neutral territory, however little it may have been observed by warring states. In 1737 Bynkershoek maintained that it was lawful for a belligerent to pursue an enemy's vessel into neutral waters, and complete the capture there *dum fervet opus*.<sup>4</sup> Fortunately this rule has never won general acceptance, and it may be considered as bad in law, though it has sometimes been quoted to justify high-handed action on the part of powerful belligerents.

In matters connected with neutrality state action was halting and uncertain till the close of the eighteenth cen-

<sup>1</sup> *De Jure Belli ac Pacis*, III., XVII., i. and iii.

<sup>2</sup> Hall, *International Law*, § 209.

<sup>3</sup> Gardener, *History of England*, IX., 60-68.

<sup>4</sup> *Quæstiones Juris Publici*, I., 8.

ture. Lip service was rendered to the two great principles of impartiality on the part of neutral powers and respect for neutral sovereignty on the part of belligerents, but both of them were frequently ignored in practice. Even when governments acted towards one another with perfect loyalty, they made no attempt to restrain the vagaries of their subjects, who might with impunity give direct assistance to either side and use neutral territory as a base of warlike operations. This unsatisfactory condition of affairs was permanently improved owing to the action of the United States in the war which broke out in 1793 between Great Britain and Revolutionary France. M. Genet, the French Minister accredited to the American Republic, caused French privateers to be fitted out in American ports and despatched therefrom to prey upon British commerce. He also set up Prize Courts in connection with French Consulates in the United States; and these courts tried and condemned British vessels which had been captured by French cruisers and brought into American waters. Great Britain complained of these acts as injurious to her own commerce as well as derogatory to the sovereignty of the United States; and Washington's administration took the ground that by the law of nations all judicial functions within a country must be exercised by its own courts acting under the authority of its government. Jefferson, therefore, as Secretary of State, wrote to M. Genet on June 5, 1793, that "it is the right of every nation to prohibit acts of sovereignty from being exercised by any other within its limits, and the duty of a neutral nation to prohibit such as would injure one of the warring powers."<sup>1</sup> He had previously admitted to Great Britain the obligation of the United States to prevent the commissioning, equipping and manning of vessels in her ports to cruise against either belligerent. Washington did his utmost, in spite of a hostile public opinion and a defective condition of the law, to enforce respect for the principles his government had

<sup>1</sup> Wharton, *International Law of the United States*, § 398.

laid down. He ordered the collectors of customs throughout the Union to prevent the original arming and equipping of cruisers destined for belligerent service and the subsequent equipment of vessels solely adapted to warlike uses. No enlistments were to be permitted on board a belligerent vessel enjoying the hospitality of American ports, unless the recruits were subjects of the power which owned the ship, and not inhabitants of the United States. M. Genet not only paid no heed to remonstrances, but endeavored to stir up opposition to the administration. His recall was therefore demanded; and the first great triumph of the American Government in its policy of strict and honest neutrality was won when the French Republic compelled its minister to return in disgrace, and instructed his successor to disarm the privateers which had been fitted out in the United States and remove the consuls who had taken part in the proceedings of the so-called Consular Prize Courts. A few months before it had received a check in the acquittal of Gideon Henfield, an American citizen who had taken service at Charleston on board a French privateer, and was indicted at common law for enlisting in violation of the treaties of the United States. But in 1794 Congress forbade American citizens to enlist in the army or navy of a foreign state, and prohibited other acts in defiance of the neutrality of the United States. It also gave the President the right to use the army and navy to prevent the departure from American jurisdiction of vessels offending against the Act. This was the first of the American statutes passed for the purpose of arming the central government with power to perform its obligations as a neutral. Originally its operation was limited in point of time, but in 1800 it was made perpetual. Additional acts and amending acts were passed at frequent intervals, till in 1818 the whole law on the subject of neutrality was codified and embodied in the great Foreign Enlistment Act which is still in force. By this statute citizens of the United States are prohibited from serving in war against



any foreign state with which the United States are at peace; and a variety of acts are made criminal, among the chief of which are fitting out or arming any vessel within American jurisdiction with the intent that it shall be employed as a belligerent cruiser in a war in which the United States is neutral, increasing within the United States the warlike force of any cruiser so employed, and setting on foot in the territory or territorial waters of the Union armed expeditions against any country with which the United States is at peace.<sup>1</sup>

These proceedings of the United States from 1793 to 1818 mark an era in the development of the rights and obligations of neutral powers. The grounds on which the action of the American Government was based are to be found in the works of the great publicists of the eighteenth century; but never before had the principles laid down by these writers been so rigorously applied and so loyally acted upon. The practical deductions drawn from them by Washington and his Cabinet were seen to be just and logical, and the governments of other states followed in their turn the American example. It was recognized that not only must a neutral state refrain from giving official aid to the belligerents in matters relating to the war, but it must also restrain its subjects from such acts as have a direct and immediate effect in augmenting the warlike force of any of the parties to the contest. Proper care for its own sovereign rights compels it to insist upon respect for the neutrality of its territory, just as a sense of justice towards the belligerent who would suffer from illegal enterprises causes it to put them down with a strong hand. In 1819 Great Britain adopted a neutrality statute based avowedly upon the act passed by Congress in the previous year; and in 1870, after her experience

<sup>1</sup> For an account of the efforts of Washington's government to preserve an honest neutrality, see Wheaton, *International Law* (Dana's ed.), note 215, and Wharton, *International Law of the United States*, §§ 395, 396, 398-402.

of the weakness of her law in dealing with the *Alabama* and other Confederate cruisers, she strengthened it by a new and more stringent Foreign Enlistment Act, which in several particulars goes beyond the American law in severity. The neutrality regulations of other civilized states are drawn upon similar lines, though they differ considerably from one another in their prohibitions and permissions. There is some danger lest the obligations placed upon neutral governments should become too burdensome. In the interests of humanity peace should be made easy and war difficult. But if the duties of neutrality are to be extended to comparatively trivial matters, the performance of them will be rendered so difficult and expensive, and the consequences of a failure to fulfil them will be so severe, that a hesitating state may possibly prefer the path of belligerency as on the whole the path of safety. When we come to consider in detail the duties of neutral governments,<sup>1</sup> we shall be in a position to appreciate the necessity of this warning, in view of certain modern proposals to place upon them responsibilities which Washington and Jefferson repudiated and no European country has ventured to assume.

### § 245.

The older text-writers divided neutrality into two kinds. The first, called perfect neutrality, was simply that which we now understand by the term neutrality. It was the condition of states who took no part in the contest, but remained on friendly terms with both sides. The second, called imperfect or qualified neutrality, occurred when a neutral state gave either active aid or special privileges to one of the belligerents under the provisions of a treaty made before the war and not in anticipation of it. It is hardly necessary to say, after the historical view we have just concluded, that the latter is no

Neutrality and  
Neutralization.  
The correct mean-  
ing of the latter.

<sup>1</sup> See Pt. IV., Ch. iii.

longer recognized, though Wheaton and even Halleck refer to it as if it still existed.<sup>1</sup> No state would be permitted in modern times to send a contingent to the army or navy of a belligerent on the plea that it had covenanted to do so long before; and even an agreement to give to one side advantages denied to the other would be resented, probably to the point of actual hostilities, if no redress followed the complaints of the injured belligerent. But though neutrality is legally one and the same in all cases, and cannot be separated into kinds and classes, neutral states naturally divide into those which refrain from war of their own free will, and those which are obliged by the conditions of their existence to take no part in hostilities except for the defence of their frontiers from actual attack. The difference between them is the difference between neutrality and neutralization, and this we will proceed to elucidate.

"In ordinary neutrality there are two elements—the element of abstention from acts of war, and the element of freedom to abstain or not to abstain at pleasure."<sup>2</sup> Take away the latter and we obtain neutralization. A neutral state can, if it pleases, cease to be neutral and join in the war. A neutral individual may acquire a belligerent character by enrolling himself in the army or navy of a power engaged in hostilities, and as far as International Law is concerned he is perfectly free to do so, though the municipal law of most civilized states renders their subjects liable to punishment for such an act. But there are states in existence which are not free to take part in any war which may arise among their neighbors, and there are individuals in existence who lose certain valuable privileges and immunities if they engage in hostilities. These are neutralized states and neutralized individuals; and the process of neutralization may be made to apply equally well to seas and

<sup>1</sup> Wheaton, *International Law*, § 415; Halleck, *International Law*, Ch. XXIV., § 2.

<sup>2</sup> Lawrence, *Essays on International Law* (2d ed.), p. 144.

waterways, and even to such things as buildings, ambulances and ships. In the words of Professor Holland, to neutralize means "to bestow by convention a neutral character upon states, persons and things which would or might otherwise bear a belligerent character."<sup>1</sup> Neutralized states, persons and things occupy exactly the same position towards hostilities actually in progress as neutral states, persons and things; but they differ from the latter in that they are bound by international agreement to take no part in warlike acts, and are protected from warlike operations as long as they respect this obligation.

So great a change in their legal position cannot be made without the consent of all the parties affected thereby. A power is incapable of neutralizing its territory by its own mere declaration, because the rights and duties of other powers would be altered considerably by such a neutralization, and their consent must therefore be obtained before it can be legally carried out. Similarly two or three powers are incapable of neutralizing the territory of one of their number; for they have no authority to legislate for the civilized world, and to warn other powers off a spot where belligerent operations could previously be carried on by all who chose to go to war with the state which owned it. The common law of nations cannot be overridden by the *ipse dixit* of one of the communities subject to it, or even by a group of them. The change, if it is to be internationally valid, must be the result of general agreement. At the very least it must be accepted by all the important states concerned in the matter. Any smaller number may bind themselves to one another to protect a territory from hostile operations; but they cannot alter its international *status*, or render an attack upon it an offence against the public law of the civilized world. What is true of territory is true of persons and things. International Law gives to all lawful combatants the right to use force against certain individuals and

<sup>1</sup> Article in the *Fortnightly Review* for July, 1883.

certain property, and this right cannot be taken away except by an agreement so general as to amount to a legislative act binding upon civilized mankind.

### § 246.

The chief existing instances of undoubted neutralization give the support of history and practice to the doctrines we have arrived at by reasoning from general principles. There are at the present time three Instances of true Neutralization examined. European states which occupy a position of guaranteed and permanent neutrality, on condition that they refrain from all belligerent operations save such as are necessary to protect them from actual or threatened attack. The first of these in point of time was Switzerland. The Swiss Confederation succeeded in maintaining both its independence and its neutrality from the Peace of Westphalia to the French Revolution; but in the stormy times which followed it was torn by internal dissensions and its territory was frequently invaded by French, Austrian and Russian armies. After the final overthrow of Napoleon a declaration was signed at Paris on Nov. 20, 1815, by the representatives of Great Britain, Austria, France, Prussia and Russia, whereby they formally recognized the perpetual neutrality of Switzerland and guaranteed the inviolability of its territory within the limits established by the Congress of Vienna.<sup>1</sup> The agreement of the five Great Powers was held to be sufficient to elevate the neutralization of Switzerland into a principle of the public law of Europe, and its sanctity is none the less real because the Swiss people have shown themselves resolved to defend the integrity of their frontiers by well-armed and admirably organized battalions of hardy mountaineers. No case of violation of their territory has occurred since 1815. The political advantages of its isolation from warlike operations

<sup>1</sup> Wheaton, *History of the Law of Nations*, Pt. IV., § 17.

are so manifest, that none of the neighboring states is likely to venture upon invasion, with the certainty before it of encountering a desperate resistance from the inhabitants and bringing about the armed intervention of some of the guaranteeing powers.

The case of Belgium must be considered next. It was united with Holland by the Congress of Vienna, and the two together were known as the Kingdom of the Netherlands. But in 1830 the Belgians rose in revolt against the House of Orange. The King of the Netherlands requested the mediation of the Great Powers; but to his disgust they insisted upon intervention. In a long series of negotiations, diversified by a French attack on the citadel of Antwerp and an English blockade of the Scheldt, the Belgian frontiers were defined and Belgium was erected into a separate kingdom, whose perpetual neutrality was guaranteed by the powers. These arrangements were embodied in a great international treaty signed in November, 1831; but Belgium and Holland did not come to terms till April, 1839. Their agreement was confirmed by the five Great Powers in another treaty of the same date, which repeated the guarantee of the independence and neutrality of the Belgian Kingdom, and bound it to refrain from interference in the armed struggles of other states.<sup>1</sup> This obligation it has loyally fulfilled; and though intrigues against its independence have not been wanting, it has hitherto been preserved from attack. The successful intervention of Great Britain on its behalf in 1870 has already been chronicled;<sup>2</sup> and it is hardly possible to doubt that one or more of the powers would assist it, should its integrity be exposed to serious danger at any future time. The strictness with which its duty of taking no part in the quarrels of other powers has been construed was very well illustrated in the course of the negotiations

<sup>1</sup> Wheaton, *History of the Law of Nations*, Pt. IV., § 26; Fyffe, *Modern Europe*, II., 381-390; Hertzslet, *Map of Europe by Treaty*, II., 859-884, 996-998.

<sup>2</sup> See § 83.

which terminated in the neutralization of Luxemburg, the last of the three European states which have been placed in a condition of permanent and guaranteed neutrality. In the general settlement of Europe after the downfall of the first Napoleon, the Grand Duchy had been added to the dominions of the King of Holland as a separate and independent state, and made into a member of the German Confederation. As such its capital was garrisoned by Prussian troops, who remained after the disruption of the Confederation in 1866. France objected to their presence, and threatened war if they were not removed. The question was settled by a Conference, which met at London in May, 1867, and placed the Grand Duchy under the collective guarantee of the powers as a permanently neutralized territory. Prussia was to withdraw its soldiers, and the fortifications of the city were to be demolished. Belgium, as one of the states immediately concerned, took part in the Conference and assented to the conclusions arrived at by the assembled plenipotentiaries, but did not sign the treaty in which they were embodied. It contained a guarantee of the neutrality of Luxemburg; and Belgium, being itself a permanently neutralized state, was regarded as incapable of entering into an engagement which might involve her in war for other purposes than those of the strictest self-defence.<sup>1</sup> This important indication of the nature and extent of the obligations attached to a neutralized state by the public law of Europe renders the Conference of London memorable from the point of view of the jurist. But it also possesses a further title to his regard. The five Great Powers agreed to invite Italy to join them in sending representatives to deal with the matters under consideration. Their invitation was held to raise her to the rank of a Great Power. She has acted as such on all subsequent occasions; and her elevation seems to show that among the functions of primacy performed by the Great Powers<sup>2</sup>

<sup>1</sup> Fyffe, *Modern Europe*, III., 402; Hertslet, *Map of Europe by Treaty*, III., 1803.

<sup>2</sup> See § 135.

must be reckoned the addition of fresh states to their number by a process of co-option. The political order established by the Conference of 1867 has remained in existence up to the present time. On the death of the King of Holland in 1890, and the accession of his daughter to the Dutch throne, Luxemburg passed under the rule of Duke Adolph of Nassau, since by its constitution a female was incapable of reigning. But the dissolution of what was a purely personal tie has made no difference in the neutralized condition of the little state. Its population sympathized largely with the French in the war of 1870, and were accused by Prince Bismarck of aiding them in various ways inconsistent with true neutrality. His threat to disregard the integrity of the Duchy was, however, never carried into effect. Probably it fulfilled its purpose by calling the attention of the authorities and the people to the tenure on which they held their exceptional position.<sup>1</sup>

Seas and straits could be neutralized as well as territory, if all the maritime powers, or even the leading ones among them and those specially interested in the area in question, agreed to refrain from naval hostilities within it and enforce the observance of this regulation upon recalcitrant states. But no such neutralization has been effected except in the case of the Suez Canal, the present position of which was described when we were dealing with the Law of Peace.<sup>2</sup> It should be noted that the Convention of October, 1888, which imposed upon the canal and its approaches a permanently neutral character, was signed by the six Great Powers, and Turkey, Spain and the Netherlands. Moreover, its sixteenth article contained a stipulation that other powers should be invited to accede to it. It bore, therefore, from the first the character of a great international act, and is likely to have that quality more deeply impressed upon it as time goes on. There can be no doubt that it has given

<sup>1</sup> Amos, *Political and Legal Remedies for War*, pp. 222, 223.

<sup>2</sup> See § 110.



to the canal a definite *status* and settled its position in International Law. In 1856 the Kediye Said, in a concession to M. de Lesseps, declared that the canal and its ports should always be open as neutral passages to all ships of commerce.<sup>1</sup> This unilateral statement was invoked by the great French engineer in 1882, in support of his contention that the British, in seizing the canal and making it the base of their operations in Egypt, were guilty of unlawful interference with a neutralized waterway. But he stood almost alone in the view he took of their proceedings. His protests were disregarded by statesmen, who began soon after they were made the long and intricate series of negotiations which led to the Convention of 1888. It is obvious that, had the canal been already neutralized, it would not have been necessary to spend five or six years on the discussion of plans for imposing a neutral character upon it.

The best example of the neutralization of persons and things is to be found in the Geneva Convention of 1864. That great international document protected from intentional attack, by either belligerent, surgeons, nurses, chaplains and others engaged in the care of the sick and wounded, and also extended the same immunity to ambulances and military hospitals, on condition that they were used exclusively for their proper purpose, and showed side by side with the national flag another flag bearing a red cross on a white ground. A similar badge is to be worn on the arm by all persons entitled to exemption from attack or capture under the Convention.<sup>2</sup> The humanitarian feelings which prompted the negotiation of this instrument have secured its observance in subsequent wars. Each armed struggle produces a plentiful crop of recriminations between the belligerents; but on the whole it seems clear that few intentional violations of the Convention have taken place, though the brutal and debased persons who are to be found here and there in

<sup>1</sup> British State Papers, *Egypt*, No. 23 (1883), p. 6.

<sup>2</sup> *Treaties of the United States*, pp. 1151-1153.

the ranks of the most civilized armies have undoubtedly taken advantage of opportunities to ignore its beneficent rules, and states have not yet seen their way to make a breach of them punishable under their military codes. It is obvious that in the hurry and turmoil of an engagement incidental damage must frequently be done to the persons and things connected with the hospital service on either side. Stray bullets and wandering shells have no respect for the Geneva cross. War is in itself so terrible and so destructive that the best regulations can do no more than mitigate its horrors; and in the opinion of many ambulance surgeons and other experts the increased efficiency of modern rifles and artillery will result in such a multiplication of the wounded in future conflicts that the present means of dealing with them will be found miserably inadequate. The Geneva Convention has been accepted by the United States of America, all the Great Powers of Europe, and a host of smaller states so numerous as practically to cover the whole field. It may be regarded as part of the public law of the civilized world.

The instances we have just given support the doctrine that no true neutralization can be accomplished without the consent of powers sufficient by their weight and numbers to perform a legislative act, if not for and on behalf of the whole family of nations, at least for and on behalf of all nations likely to be interested. The Great Powers speak for the whole of Europe in many matters, and therefore their assent to the political arrangements involved in the neutralization of a state may be regarded as the assent of Europe, unless any of the smaller states openly signify their disagreement. The United States were not asked to accede to the neutralization of Switzerland, Belgium or Luxemburg, partly because it was felt that they had no interest in the questions at stake, and partly because they had declared from the outset of their career as an independent nation that they would have nothing to do with the political system of the Old World. But when a great change for the better in the

customs of warfare came to be contemplated, it was clear that International Law on such a subject could not be modified so as to make the new rules binding upon all, unless every important power gave its express consent. The accession of the Cabinet of Washington to the Geneva Convention was therefore requested; and not till it was given in 1882 could the complete neutralization of the persons and things devoted to the service of the sick and wounded be deemed to have been embodied as an accepted principle in the international code. On the other hand the neutralization of the Suez Canal may be considered as having been accomplished by the Convention of 1888, which has been neither accepted nor protested against by the United States. The reason for the difference in the two cases is that American armies may be a most important factor in land warfare, as the civil war between the Northern and Southern states conclusively proved, whereas American ships make hardly any use of the Suez Canal. In 1895, the last year for which the figures are available, only five vessels passed through the canal under the flag of the United States, as against 2381 belonging to Great Britain.<sup>1</sup>

It is necessary to add that the word *neutralization* and kindred terms have sometimes been used in a loose and inaccurate sense in treaties and other international documents. Rivers that have been opened to the peaceful commerce of the world, straits and seas on the shores of which each of the two contracting parties has bound itself not to erect fortifications, have been spoken of as neutralized; while an arrangement whereby a powerful state has undertaken to assist a weak neighbor in defending from attack an important waterway has been declared to amount to a valid and complete neutralization.<sup>2</sup> Precision of statement and cogency of reasoning are impossible unless the words used have a clear

<sup>1</sup> *Statesman's Year Book for 1897*, p. 1057.

<sup>2</sup> For instances see Lawrence, *Essays on International Law* (2d ed.), pp. 142-156.

and recognized meaning attached to them. Theological controversies are not the only ones that have arisen for lack of a definition of technical terms. If the phrases connected with neutralization were never used save in the sense that our analysis shows to belong to them, more than one international dispute would disappear for lack of material to sustain it. It is fortunate that when in 1817 the United States and Great Britain restricted by mutual agreement the naval force each was to maintain on the Great Lakes, and cut it down to a few gunboats useful only for the purposes of police,<sup>1</sup> they did not attempt to dignify a small and sensible restraint upon their sovereign rights with the high-sounding name of neutralization; and it would have been well if the same reticence had been observed in other cases.

### § 247.

We have now dealt with neutralized states, neutralized waterways and neutralized persons and things, but we have given no consideration to neutralized provinces. Neutralized portions of unneutralized states. They are portions of states; and the bodies politic to which they belong are free to make war at pleasure. The position of a neutralized part of an unneutralized state is so anomalous that we have been obliged to reserve it for separate treatment in this section. The most conspicuous instance is that of Savoy, which was neutralized in 1815 by the treaties of Vienna and Paris, and made to "form a part of the neutrality of Switzerland." Savoy then belonged to Sardinia, and it was stipulated that if the neighboring powers were at war the province should be evacuated by Sardinian soldiers and garrisoned for the time being by the neutral troops of Switzerland. When in 1860 Savoy was ceded to France, both Switzerland and the Great Powers declared that the original engagement of neutrality was given in the interests of all the parties to the treaties of

<sup>1</sup> *Treaties of the United States*, pp. 413-415.

1815, and argued that, if the province were united to a great military state like France, there could be little or no security for the continuance of the special condition imposed upon it. France and Sardinia on the other hand contended that the neutrality guaranteed to Savoy was in favor of Sardinia only; but they were willing to agree that France, as successor to Sardinia, should fulfil the obligations arising out of it.<sup>1</sup> No solution of the difficulty by general consent was reached at the time; but when in 1883 the Federal Council of Switzerland complained of the commencement of fortifications by France on the neutralized territory and not far from the city of Geneva, the government of the French Republic recognized the justice of the Swiss remonstrance and ordered the works to be discontinued.<sup>2</sup> It is clear, therefore, that some limitation upon the ordinary rights of sovereignty is accepted by France as a condition of its tenure of Savoy. Yet it is impossible to say how far this limitation extends, and what amount of recognition of Savoyard neutrality could be asked of a power which was engaged in warfare with France. The government of the Republic would be free to obtain conscripts from the population of the province supposed to be neutralized, and to levy therein extraordinary taxes for the purpose of supporting the war. It would not be obliged to evacuate the territory and allow Swiss troops to hold it during hostilities; for nothing of the kind was done in the course of the great struggle with Germany in 1870, and the precedents of that period would probably be followed in any future war. But if France is free to use all the resources of Savoy for warlike purposes, it is hardly likely that the enemies of France will abstain from attacking Savoyard territory should they deem themselves likely to gain any military advantage from invasion. No German troops attempted to penetrate into it during the war of 1870—

<sup>1</sup> Amos, *Political and Legal Remedies for War*, pp. 217, 218; Wheaton, *International Law* (Dana's ed.), note 202.

<sup>2</sup> *Annual Register for 1883*, pp. 269, 270.

1871; but the strategy of their leaders did not include military operations so far to the south. Had the plan of their campaign required it, they would undoubtedly have entered the province without hesitation; and it is difficult to believe that Italian strategists have allowed their calculations of the chances of invasion to be altered in any way by the shadowy neutrality of a portion of the frontier between Italy and her northwestern neighbor. Considerations of a similar kind apply to Corfu and Paxo, two of the Ionian Islands, which were formally neutralized by the Great Powers when the group to which they belong was handed over to Greece in 1864. The King of Greece engaged "to maintain such neutrality."<sup>1</sup> His obligations are nowhere expressed in more definite phraseology, and it is obvious that they are as vague as words can make them. The Greek Government draws men and supplies from these islands, as from other portions of its dominions; and, that being the case, justice appears to demand that a power at war with Greece should be free to attack and occupy them. When a whole state has been neutralized its rights and obligations are clear; but legal ingenuity fails before the attempt to define the immunities and duties of a neutralized part of a non-neutralized whole. Its position is anomalous to the last degree. We may rest assured that such an artificial arrangement will not stand the strain of a serious war.

Some perception of the difficulties we have indicated seems to have influenced the powers assembled in the West African Congress of Berlin, when they discussed the question of the neutrality of the territories comprised in the conventional basin of the Congo, some of which belong to various European states. Mr. Kasson, the American plenipotentiary, proposed that the districts in question should be permanently neutralized under the guarantee of the signatory powers. But though the project brought forward by him received weighty support, the Congress finally decided

<sup>1</sup> Holland, *European Concert in the Eastern Question*, pp. 45-54.

against it, on the ground that a belligerent state could not be required to deprive itself of a part of its means of action, or to refrain from using a portion of its dominions. The representative of the United States pointed out that the development of America in the colonial epoch had been greatly retarded by wars between the European powers who held territorial possessions within it, and declared that his proposition was formulated with a view to saving Africa from similar calamities. The object of the American Government met with general concurrence, and an attempt was made to realize it in the Final Act of the Conference, which was signed on Feb. 26, 1885. The eleventh article provided that "in case a power exercising rights of sovereignty or protectorate in the counties mentioned in article 1, and placed under the free-trade system, shall be involved in a war, then the High Signatory Parties to the present Act, and those who shall hereafter adopt it, bind themselves to lend their good offices in order that the territories belonging to this power and comprised in the conventional free-trade zone, shall, by the common consent of this power and the other belligerent or belligerents, be placed during the war under the rule of neutrality, and considered as belonging to a non-belligerent state, the belligerents henceforth abstaining from extending hostilities to the territories thus neutralized, and from using them as a base for warlike operations." Temporary exemption from hostilities by the consent of all the parties to the war is very different from permanent neutralization. But it may be possible when the latter is impossible. Should the case contemplated above ever arise, it will be interesting to watch whether the belligerent powers agree to make the arrangement indicated, or are content to regard it as a counsel of perfection inapplicable to mundane affairs.<sup>1</sup>

<sup>1</sup> See *Protocols and General Act of the West African Conference*, in British State Papers, *Africa*, No. 4 (1885), pp. 146-149, 183-185, 256-258, 307.

## § 248.

One of the most important distinctions in the whole range of International Law is that between the two senses of the word *neutral* when used as a substantive. It may mean either a neutral state or an individual who is a subject and citizen of a neutral state. The rights and obligations of the former differ widely from those of the latter; and yet, owing to the ambiguity of the term applied indifferently to both, even approved writers sometimes use language calculated to cause error and confusion. Halleck, for instance, says of neutrals, "While in some respects their trade and commerce may be increased in extent and profit, it is restricted with respect to blockades and sieges and the carrying of contraband, and their vessels are subjected to the inconvenience and annoyance of visit and search. Not only are they obliged to maintain strict impartiality towards the belligerents, but they are bound to prevent and punish any violation of the rights of neutrality by either of the parties at war with each other."<sup>1</sup> Of these two sentences the first applies exclusively to neutral individuals, the second to neutral states. Yet there is nothing in the text to suggest the difference, and a student reading them without the aid of other sources of information would imagine either that neutral vessels of war were used as trading-ships and subjected to belligerent search, or that neutral individuals were under an obligation to punish any violations of neutrality by the parties to the war. Both propositions are not only untrue, but the very reverse of the truth. It would be absurd to suppose that Halleck wished to convey impressions so obviously wrong. His mistake lay in neglecting to make a distinction at the outset between the two great divisions into which the whole Law of Neutrality naturally falls. They are

The divisions of  
the Law of Neu-  
trality.

<sup>1</sup> Halleck, *International Law*, Ch. XXIV., § 3.



I. Rights and obligations as between Belligerent States and Neutral States.

II. Rights and obligations as between Belligerent States and Neutral Individuals.

The distinction has only to be stated in order to be recognized as just and necessary. A neutral state has many rights against a belligerent which from the nature of the case a neutral individual cannot have, and is under many obligations from which a neutral individual is free. On the other hand the neutral individual may do many acts which the neutral state may not do, and is subjected to many interferences from which the neutral state is free. And just as the rights and obligations differ in the two cases, so also do the remedies. When state wrongs state, the remedy is international; but when a neutral individual indulges in conduct which a belligerent has a right to prevent, the injured government strikes directly at him and punishes him in its own courts. The neutral state of which he is a subject has nothing to do with the matter, unless the belligerent attempts to punish for acts deemed innocent by International Law or to inflict severer penalties than its rules allow. As we consider in detail the rights and obligations of neutrality, the distinction we have just drawn in outline will become fully apparent.

Our two main divisions work out into a variety of subordinate heads, each of which will be dealt with in a separate chapter. The following table shows in a graphic manner the way in which we propose to arrange the subject.

Law of Neutrality as between State and State.	{ (1) Duties of a Belligerent State towards Neutral States. (2) Duties of a Neutral State towards Belligerent States.
II. Law of Neutrality as between States and individuals.	{ (1) Ordinary Neutral Commerce. (2) Blockade. (3) Contraband Trade. (4) Unneutral Service.

## CHAPTER II.

### THE DUTIES OF BELLIGERENT STATES TOWARDS NEUTRAL STATES.

#### § 249.

THE law of nations is fairly explicit on the subject of the obligations of belligerent states in their dealings with those of their neighbors who remain neutral in the contest. The first and most important of their duties in this connection is

*To refrain from carrying on hostilities within neutral territory.*

We have already seen that, though this obligation was recognized in theory during the infancy of International Law, it was often very imperfectly observed in practice.

(1) To refrain  
from carrying on  
hostilities within  
neutral territory.

But in modern times it has been strictly enforced, and any state which knowingly ordered warlike operations to be carried on in neutral territory, or refused to disavow and make reparation for such acts when committed by its subordinates on their own initiative, would bring down upon itself the reprobation of civilized mankind. Hostilities may be carried on in the territory of either belligerent, on the high seas and in territory belonging to no one. Neutral land and neutral territorial waters are sacred. No acts of warfare may lawfully take place within them, and if any are unlawfully entered upon, the offending belligerent ought to make ample reparation and apology. The rule is strictly construed against warring powers. Even when

their cruisers have begun the chase of an enemy vessel on the high seas, they may not follow it into neutral waters, and there complete the capture.

Nevertheless all authorities admit that the exigencies of self-defence will justify a temporary violation of neutral territory. But it must be confined within the strictest limits required by the necessity of the case, and the power which is obliged to resort to it should tender a prompt apology. The act is illegal; but if the necessity is sufficiently imperative, a wise neutral will condone it on the tender of proper explanations. The whole question was threshed out in the case of the *Caroline*, which occurred in the course of the rebellion against the British authorities in Canada during the winter of 1837-1838. The insurgents had occupied Navy Island, an island in the Niagara River, through the midst of which the boundary between the United States and the British possessions runs, and with the aid of American sympathizers they were using the steamer *Caroline* to transport munitions of war and armed men to the island. Preparations were being made to cross from it to the Canadian side, when the British commander determined to put an end to the danger by seizing the insurgent vessel. He sent a body of men to capture her in the night at her usual moorings in Canadian waters. She had, however, been moved over to the American side, whither she was followed by the attacking party, who boarded and captured her, and then set her on fire and sent her adrift down the rapids and over the falls of Niagara. A correspondence ensued between the two governments, each of which deemed that it had a grievance against the other. The Cabinet of Washington complained of the attack as an outrage upon the territory of the United States, and the British Ministry replied by calling attention to the impunity enjoyed by the insurgents in fitting out armed expeditions on American soil. No satisfactory result was arrived at, and after a time the matter dropped, till its reappearance in a more threatening form was caused by the

arrest of Alexander McLeod in January, 1841, within the territory of the State of New York. He had been a member of the party which boarded the *Caroline*, and was put on his trial for the murder of one Durfee who had been killed in the attack. Great Britain demanded his release on the ground that he was acting under orders from his commanding officer and was therefore an agent of the government. The act in which he took part was a state act, for which the nation assumed full responsibility. It was argued that under such circumstances an individual could not be held answerable in his private capacity; and Mr. Webster, then Secretary of State at Washington, admitted the justice of the contention, while pointing out that, as the case had come before the courts, the release of McLeod must be brought about by judicial procedure and could not be effected by administrative order. Unfortunately technical difficulties, since removed by act of Congress, blocked the way; but the accused was at last found "not guilty" by a court of the state of New York, and in consequence regained his liberty on the main issue and not on the point raised by the British Government. During the correspondence upon his case the question of the capture of the *Caroline* was revived, and Lord Ashburton, who had been sent to Washington in 1842 to settle all outstanding difficulties between England and America, expressed regret for the violation of neutral territory and the absence of any explanation and apology at the time. He, however, contended that the attack on the *Caroline* was justifiable by the test that Mr. Webster himself had supplied in the statement that, in order to excuse such an act, it was necessary "to show a necessity of self-defence, instant, overwhelming, leaving no choice of means and no moment for deliberation." The American Government accepted these assurances in a conciliatory spirit, and the incident then terminated.<sup>1</sup> It may be held to show that

<sup>1</sup> Wharton, *International Law of the United States*, §§ 21, 50 c., 350; *Annual Register for 1841*, pp. 310-317; *Annual Register for 1842*, pp. 319-320.

temporary violations of neutral territory, resorted to under the stress of a great emergency and limited in point of time and magnitude to the warding off of the danger which caused them, are but technical offences, to be apologized for on the one hand and condoned on the other, but not regarded as serious wrongs for which substantial reparation is due.

### § 250.

The rule of abstention from active hostility in neutral waters or on neutral land has received in comparatively recent times an obvious and reasonable extension. It is now the duty of belligerents

*To abstain from making on neutral territory direct preparations for acts of hostility.*

Warlike expeditions may not be fitted out within neutral borders, nor may neutral land or waters be made a base of operations against an enemy. The fighting forces of a belligerent may not be reinforced or recruited in neutral territory, and supplies of arms and warlike stores or other equipments of direct use for war may not be obtained therein. But these prohibitions do not extend to remote uses, and the supplies and equipments that are useful for such purposes as sustaining life or carrying on navigation. Provisions may be purchased by belligerent ships lying in neutral ports, and they may take on board masts, spars and cordage, and even undergo repairs; but nothing beyond what is necessary to make them seaworthy must be done to them. Any structural changes that increase their efficiency as instruments of attack and defence are strictly forbidden, as well as any augmentation of their warlike force. A neutral state may, if it chooses, restrict the amount of innocent supplies allowed to belligerent ships who take advantage of the hospitality of

(2) To abstain from making on neutral territory direct preparations for acts of hostility.

its ports and waters, and a usage is springing up of permitting such vessels to take on board only a limited quantity of coal. A distinction must, however, be drawn between prohibitions which depend entirely upon the will of the neutral and prohibitions which are imposed by International Law. The former can be made or unmade, strengthened or relaxed at pleasure; and as long as they are reasonable in themselves and applied with absolute impartiality to both sides in the struggle, no power has any reason to complain. The latter are fixed and constant, and if a belligerent ignores them or a neutral suffers them to be ignored, the aggrieved parties, whether neutral or belligerent, can demand reparation and take means to prevent a repetition of the offence.

We have seen that a belligerent is bound not to use neutral territory as a base of operations, or as a convenient place for the organization of warlike expeditions which may proceed from thence to attack the enemy or prey upon his commerce. But it is impossible to understand the nature and extent of these obligations without an examination of the exact sense to be attached to the two phases, "base of operations" and "warlike expedition." The former is a technical term of the military art, and was introduced into International Law when the growing sense of state-duty rendered it necessary to define with accuracy the limits of belligerent liberty and neutral forbearance. It is to be found in the second of the three rules of the Treaty of Washington of 1871;<sup>1</sup> but the Geneva arbitrators did not attempt to explain it in their award. Hall quotes from Jomini, the great French writer on the art of war, a definition of a base of operations as a place or station "from which an army draws its resources and reinforcements, that from which it sets forth on an offensive expedition, and in which it finds a refuge at need."<sup>2</sup> He goes on to contend that "continued use is above all things the crucial test of a base"; and it is difficult to resist the

<sup>1</sup> See § 263.

<sup>2</sup> *International Law*, § 221.

arguments in favor of this view, which applies to a fleet or a single ship as well as to an army or a detachment of troops. The drawing of supplies once or twice from a given point in the course of long-continued hostilities will not make it into a base. Constant communication must be kept up with it, from it a stream of supplies must flow, and the way to it must be open for trains and convoys to pass and repass. General Sherman, in his march through Georgia in the autumn of 1864, was said to have cut himself off from his base, because for several weeks he was out of reach of communications from his own side, nor could he draw stores and reinforcements from any point in the possession of the northern forces. The fact that he took provisions and forage from place after place passed by his army on its march did not make any of them into a base of operations, because the element of continuous use was wanting. Now if we apply those considerations to assist us in determining the sense to be put upon the phrase when we find it in a rule of International Law, we shall be forced to the conclusion that a belligerent does not make neutral territory or a neutral port into a base of operations by obtaining in it once or twice, or at infrequent intervals, such things as provisions, coals and naval stores. It is true that there are some articles so directly useful for purposes of hostility that to take even a single supply of them is forbidden. But these restraints are imposed by the law of nations directly and in so many words. They are not left to be derived by construction from an interpretation of general terms. Other matters must be referred to in the prohibition of the use of neutral territory as a base of operations. Undoubtedly it is aimed at the frequent drawing of stores and equipments from depots situated in neutral territory and always open to the belligerent for the replenishment of his magazines. Each separate supply may be innocent in itself, or at most of a doubtful nature. It is their constant recurrence which makes them illegal.

We have next to consider what is meant by a warlike ex-

pedition. Its simplest form was exemplified in the case of the *Twee Gebræders*.<sup>1</sup> An English ship of war lying in neutral Prussian waters had sent out boats, which captured several Dutch merchantmen just outside the limits of neutral jurisdiction, and Lord Stowell released them on the ground that no proximate acts of war could be allowed to originate in neutral territory. This occurred in 1800, and some years afterwards the more complex Terceira affair developed still further the doctrine of expeditions. In 1828 a civil war broke out in Portugal between the partisans of Donna Maria, the youthful constitutional sovereign, and those of her uncle, Don Miguel, who had seized the throne as the champion of absolutism. A body of troops in the service of Donna Maria, being driven out of Portugal, took refuge in England, and, along with other Portuguese adherents of the constitutional cause, endeavored to fit out an expedition in favor of their mistress. The British Government warned them that it would not allow the execution of such a design, and was informed in reply that the only object of the refugees was to send unarmed Portuguese and Brazilian subjects in unarmed merchant vessels to Brazil. Early in 1829 about seven hundred men under Count Saldanha embarked at Plymouth in four unarmed vessels, nominally for Brazil, but really for Terceira, one of the Azores which had remained faithful to Donna Maria. They were unarmed, but under military command; and the arms intended for them had previously been shipped as merchandise from another port. Off Port Praya in Terceira they were intercepted by Captain Walpole of the *Ranger*, who had been despatched from England to see that they did not land in the Azores. He told Count Saldanha that they were free to go where they would, except to the islands. On the refusal of the Portuguese commander to give up his purpose or yield to anything but force, his vessels were escorted to a point within five hundred miles of the English Channel. Captain Walpole

<sup>1</sup> Robinson, *Admiralty Reports*, III., 162.



then returned to Terceira, and the baffled expedition put into Brest. The case established the doctrine that, when a warlike expedition is fitted out on neutral ground against a belligerent, its individual members need not be armed in order to bring it within the purview of the law, if only they are organized as soldiers and placed under military command. The conduct of the British ministers was challenged at the time in Parliament, but they secured a majority in both Houses. Jurists have generally held that they were right in their view of the illegality of the expedition, and wrong in the means they took to stop it. They should have prevented its departure from British waters where they had jurisdiction, instead of coercing it in Portuguese waters and on the high seas where they had none. By the proceedings they ordered they violated the territorial sovereignty of another state in their zeal to prevent a violation of their own.<sup>1</sup>

Another point in connection with expeditions was raised in 1870, when a large number of Frenchmen and Germans resident in the United States returned to their own country at the outbreak of the Franco-Prussian War, in order to fulfil their obligation of military service. As long as they travelled singly or in small groups as ordinary passengers, no international question could by any possibility arise. But in one case as many as twelve hundred French subjects embarked at New York in two French ships which carried a cargo of rifles and ammunition. The attention of Mr. Fish, then Secretary of State in President Grant's Cabinet, was called to the matter. He decided that the vessels could not be looked upon as constituting a warlike expedition against Germany; and there can be little doubt that he was right.<sup>2</sup> The Frenchmen were unarmed and unofficered. There was no attempt to submit them to military discipline, and though

<sup>1</sup> Phillimore, *International Law*, III., §§ CLIX., CLX.; Pitt Cobbett, *Leading Cases on International Law*, pp. 185, 186.

<sup>2</sup> Hall, *International Law*, § 222.

it was not denied that they would be enrolled in the fighting forces of their country as soon as they reached its soil, it was held that they did not leave New York in an organized condition. Their warlike uses were too remote for them to be considered as a portion of the combatant forces of France in such a sense that American neutrality was violated by their departure, though they could have been made prisoners of war if the vessels which carried them had been captured on the voyage by German cruisers.

The three cases we have given will enable us to form a fair idea of what constitutes a warlike expedition. It must go forth with a present purpose of engaging in hostilities; it must be under military or naval command; and it must be organized with a view to proximate acts of war. But it need not be in a position to commence fighting the moment it leaves the shelter of neutral territory; nor is it necessary that its individual members should carry with them the arms they hope soon to use. When a belligerent attempts to organize portions of his combatant forces on neutral soil or in neutral waters, he commits thereby a gross offence against the sovereignty of the neutral government, and probably involves it in difficulties with the other belligerent, who suffers in proportion to his success in his unlawful enterprise. The injured neutral may not only demand reparation and indemnity, but may also use force, if necessary, to prevent the departure of expeditions from its territory or seize the persons and things of which they are composed. The exact limits of its powers and duties in such cases will be discussed when we deal with the obligations of neutral states towards belligerent states.<sup>1</sup> Here we need do no more than lay down the general principle that its operations should be confined to its own territory and its own jurisdiction, without stopping to inquire whether there are any exceptions to this rule.

<sup>1</sup> See § 264.

## § 251.

We will consider next the duty of belligerent states

*To obey all reasonable regulations made by neutral states for the protection of their neutrality.*

This duty relates chiefly, though not exclusively, to maritime affairs. The land forces of the combatants are not permitted to enter neutral territory; but, unless a neutral expressly forbids the entry of belligerent war-ships, they may freely enjoy the hospitality of its ports and waters. Permission is assumed in the absence of any notice to the contrary, but nevertheless it is a privilege based upon the consent of the neutral, and therefore capable of being accompanied by any conditions he chooses to impose. Belligerent commanders can demand that they shall not be asked to submit to unjust and unreasonable restraints, and that whatever rules are made shall be enforced impartially on both sides. But further they cannot go. Where they enter on sufferance they must respect the wishes of those who permit their presence. Only when their vessels are driven by stress of weather, or otherwise reduced to an unseaworthy condition, can they demand admission as a matter of strict law. Their right to shelter under such circumstances is called the Right of Asylum, and it cannot be refused by a neutral without a breach of international duty.

(8) To obey all reasonable regulations made by neutral states for the protection of their neutrality.

In recent times neutral states have acted upon their right of imposing conditions on belligerent vessels visiting their ports. The twenty-four hours rule is the oldest and the most common. It lays down that, when war vessels of opposing belligerents are in a neutral port at the same time, or when war vessels of one side and merchant vessels of the other are in the like predicament, at least twenty-four hours shall elapse between the departure of those who leave first and the departure of their opponents. The object of this

injunction is to prevent the occurrence of any fighting either in the waters of the neutral or so close to them as to be dangerous to vessels frequenting them. Sometimes the word of the commanders that they will not commence hostilities in or near neutral territorial waters has been accepted as sufficient. Greater precautions were generally taken for the restraint of privateers; but the practical abolition of privateering by the Declaration of Paris has made obsolete the distinction between two classes of belligerent cruisers. The possibility of evading the twenty-four hours' rule was shown by the conduct of the United States steamer *Tuscarora* at Southampton, in December, 1861, and January, 1862. The Southern cruiser *Nashville* was undergoing repairs in the harbor, and by keeping steam up, claiming to precede her whenever she attempted to depart, and then returning within a day, the *Tuscarora* really blockaded her in a British port. In the end a British ship of war, exercising a right which a neutral possesses in extreme cases,<sup>1</sup> escorted the *Nashville* past the *Tuscarora* and out to sea, while the latter was forbidden to leave the port for twenty-four hours.<sup>2</sup> This and other circumstances caused the British Government to issue on Jan. 31, 1862, a series of neutrality regulations more stringent than any hitherto published. They provided that no ship of war of either belligerent should be permitted to leave a British port from which a ship of war or merchant vessel of the other belligerent had previously departed, until after the expiration of at least twenty-four hours from the departure of the latter. They laid down further that war vessels of either belligerent should be required to depart within twenty-four hours of their entry, unless they needed more time for taking in innocent supplies or effecting lawful repairs, in which case they were to obtain special permission to remain for a longer period, and were to put to sea within

<sup>1</sup> Wheaton, *International Law* (Dana's ed.), note 208.

<sup>2</sup> British State Papers, *North America*, No. 2 (1873), pp. 242-244; Wheaton, *International Law* (Lawrence's ed.), note 216.

twenty-four hours after the reason for their remaining ceased. They might freely purchase provisions and other things necessary for the subsistence of their crews; but the amount of coal they were allowed to receive was limited to as much as was necessary to take them to the nearest port of their own country. Moreover, no two supplies of coals were to be obtained in British waters within three months of each other.<sup>1</sup> These restrictions upon the liberty of belligerent vessels in British ports have been reimposed in subsequent wars. The United States adopted them in 1870 at the outbreak of the conflict between France and Germany,<sup>2</sup> and other powers have copied them wholly or in part. In fact they have become so common that they are sometimes regarded as rules of International Law. This is especially the case with regard to the supply of coal. It is often said that a neutral state is bound to allow belligerent cruisers to take on board no more than is sufficient to carry them to the nearest port of their own country. Such an obligation is unknown to the law of nations, which arms neutrals with authority to impose what restraint they deem necessary, but does not condemn them if they impose none. It classifies coals, not with arms and ammunition, the supply of which is prohibited, but with provisions and naval stores, the supply of which is allowed. It is a grave question whether the rule ought not to be changed. In modern naval warfare speed is becoming more and more important, and coal is as much a necessity for fighting purposes as gunpowder. The presence or absence of a full supply of it may make all the difference between victory or defeat in a naval engagement, and determine whether a cruiser is to be an effective commerce-destroyer or a useless log. There is good reason, therefore, for making it into a forbidden commodity; but the change must be effected by general consent or universal custom, and

<sup>1</sup> British State Papers, *Report of the Neutrality Laws Commissioners*, pp. 77, 78.

<sup>2</sup> Wharton, *International Law of the United States*, § 402.

meanwhile nothing is gained by representing limitations of supply due to the will of the neutral as restraints imposed by the international code. Belligerents are bound to submit to reasonable regulations in this as in other matters, and neutrals are bound to take efficient means for the protection of their neutrality; but no more precise obligations have as yet been laid upon them.

In modern wars the armed vessels of the combatants have not been allowed to bring their prizes into neutral ports except in the cases covered by the Right of Asylum. Till recently, free entry was permitted, and prizes were sometimes adjudicated upon, and even sold, while lying in neutral waters, when it was not safe to bring them into a port of the captor's country. These practices caused much discussion as to the limits of the jurisdiction of Prize Courts, and were inconsistent with the newer and stricter views of state-neutrality. The transition from them to the present custom of total exclusion is seen in the regulations issued by the neutral maritime states during the struggles of the middle of the present century, especially the American Civil War. Some powers allowed prizes to be brought in by belligerent cruisers, but prohibited the sale of them in their ports and waters; others excluded them from certain ports and admitted them into the rest; while a third group excluded them altogether.<sup>1</sup> The practice of total exclusion rests upon a wide basis of recent custom, and is not likely to be departed from by civilized states; but at present it can hardly be regarded as obligatory, though in time it will probably become so.

In land warfare belligerent troops are excluded from neutral territory. Instead of being allowed, like sea forces, to come and go freely unless the government of the neutral state expressly forbids their entry, they are kept out altogether, not by the mere will of the neutral power, but by the common law of nations. The only case in which they may be per-

<sup>1</sup> British State Papers, *Report of the Neutrality Laws Commissioners*, pp. 39-79.

mitted to cross neutral borders occurs when they are driven over them by the enemy. Under such circumstances humanity forbids that they should be driven back to captivity or death by lines of neutral bayonets; but at the same time impartiality demands that they shall not be allowed to use the territory they have entered as a place of refuge, in which, safe from pursuit, they can reorganize their shattered forces, and from which they can sally forth to renew the conflict when occasion offers. The two are reconciled by the practice of disarming them as soon as they cross the frontier and retaining them in honorable detention till the conclusion of the war. This is called *interning* and the troops so treated are said to be *interned*. They are bound to submit to the process and to make no attempt to compromise the neutrality of the state in which they find asylum. The expenses to which it is put in consequence of their presence should be repaid by their own government. The last example of internment occurred in 1871, when eighty-five thousand ragged and starving French troops, the wreck of Bourbaki's army, took refuge within the Swiss frontier from the pursuit of Manteuffel in the closing days of the Franco-German War. They received permission to cross it by special convention between their commander, General Clinchant, and the Swiss General Herzog, and were at once disarmed, clothed and fed by the orders of the central government of the Helvetic Republic. At the conclusion of peace they returned to France under an agreement between the two countries which provided for the payment by the latter of a lump sum to defray the costs to which the administration and citizens of Switzerland had been put in consequence of their presence.<sup>1</sup>

<sup>1</sup> Fyffe, *Modern Europe*, III., 462; *Annual Register for 1871*, pp. 160, 161; Calvo, *Droit International*, § 2336.

## § 252.

Every belligerent lays under a strong obligation

*To make reparation to any state whose neutrality it may have violated.*

International Law contains no precise rules as to the exact form which such reparation should take. It certainly requires the restoration of property illegally captured, when ships or goods have been seized within neutral jurisdiction; but it does not go further and prescribe the scale on which indemnities should be calculated, or the wording of apologies, or the forms to be used in paying ceremonial honors to the flag of the injured state. These details are left to be settled by negotiation at the time; and all we are able to say about the matter is that the reparation should be adequate and proportioned to the gravity of the offence. In all cases it must be made to the injured neutral, whose duty it is to deal with the other belligerent if loss has fallen upon him in consequence of the violence complained of. For instance, when the commander of a ship of war seizes a vessel belonging to his enemy in neutral waters, the neutral government demands from the country of the offender the surrender of the prize, or takes possession of it if it is within the jurisdiction, and, having obtained control of it, restores it to the original belligerent owner, either by administrative act or through the machinery of a Prize Court. If the neutral state is unable or unwilling to obtain satisfaction from the offending belligerent, serious complications are likely to follow. It exposes itself to the risk of similar outrages from the injured side. Claims for indemnity may be made against it, and it may even be threatened with war.

Violations of neutrality by a belligerent may take as many forms as the duties they contravene. Like other offences



they may be gross or slight, committed in heedlessness and hot blood or carefully planned and executed according to a predetermined method. They are generally the unauthorized acts of over-zealous or unscrupulous subordinates. The appropriate reparation varies from a formal apology to a serious humiliation. In important cases the matter is brought by diplomatic complaint before the government of the offending state; and it is expected to undo the wrong as far as possible, punish the perpetrators, and give whatever satisfaction is deemed just and proper. A good example of executive action is afforded by the case of the *Florida*, one of the Confederate cruisers in the American Civil War. In October, 1864, she was seized in the neutral Brazilian port of Bahia by the Federal steamer *Wachusett* and brought as a prize to the United States. Brazil at once demanded reparation, and the government of Washington disavowed the act. Full satisfaction was offered by Mr. Seward, then Secretary of State. The commander of the *Wachusett* was tried by court-martial; the United States consul at Bahia, who had advised the attack, was dismissed; the Brazilian flag was saluted on the spot where the capture took place; and the crew of the captured vessel were set at liberty. The *Florida* herself, ought, it was admitted, to have been delivered over to the Brazilian authorities; but she was run into and sunk in Hampton Roads by a Federal transport, and it was therefore impossible to restore her.<sup>1</sup>

It is sometimes held that states engaged in hostilities possess a right to make use of and even destroy vessels and other property belonging to neutral individuals and found within the limits of belligerent authority, if the exigencies of warfare render such use or destruction a matter of great and pressing importance. This real or supposed right is called *Droit d'Angarie* or *Angaria*, which has been anglicized into *Angary*. Another name for it is *Prestation*.

<sup>1</sup> Wharton, *International Law of the United States*, §§ 27, 399; Wheaton, *International Law* (Dana's ed.), note 209.

Undoubtedly the property of neutrals permanently situated in belligerent territory must share the risks of war. But when the right to deal with it is extended to cover the seizure of neutral vessels trading in belligerent ports and their use as transports for an expedition against the enemy, we may well hesitate to accept a doctrine so inconsistent with acknowledged principles. Nothing but long and uninterrupted usage can justify a practice which runs counter to the rudimentary principle that a belligerent must make war with his own resources. If he can seize neutral ships, there seems no reason why he may not also seize neutral specie, neutral arms and even neutral subjects. If the methods of a bandit are forbidden in some matters, why not in all? Unfortunately there can be no doubt that the practice of states, even in modern times, has permitted such seizures as we are discussing. In most cases payment has been made for the service rendered, and there are in existence treaties which provide for compensation. Hall discusses the matter fully, but cautiously refrains from expressing a decided opinion upon it.<sup>1</sup> He cites a number of continental writers and refers to several cases, the general result of which is to justify seizure under stress of extreme necessity. Phillimore declares that it can be excused by nothing short of an emergency "which would compel an individual to seize his neighbor's horse or weapon to defend his own life."<sup>2</sup> Most of the jurists who have dealt with the subject do not distinguish between acts which, though contrary to law, are condoned on the plea of necessity, and acts which may be lawfully done under certain conditions and in certain circumstances. Angary belongs to the former class. In the words of Dana, "it is not a right at all, but an act resorted to from necessity, for which apology and compensation must be made, at the peril of war."<sup>3</sup> The last instance of it bears out this view. In 1870 the Germans sank six English

<sup>1</sup> *International Law*, § 278.

<sup>2</sup> *International Law*, III., § XXIX.

<sup>3</sup> Note 162 to Wheaton's *International Law*.

merchant vessels in the Seine at Duclair to stop the advance up the river of some French gunboats. Compensation was demanded and given, and the act was excused on the ground that the danger was pressing and could not be met in any other way.<sup>1</sup> Angary is no exception to the rule that the belligerent is bound to make reparation to the neutral for any violation of neutral rights of which he may have been guilty.

<sup>1</sup> *Annual Register for 1870*, p. 110.

## CHAPTER III.

### THE DUTIES OF NEUTRAL STATES TOWARDS BELLIGERENT STATES.

#### § 253.

THE rules which prescribe the duties of neutral states in their dealings with belligerent members of the family of nations are of two kinds. Some of them are perfectly clear. They order definite acts and omissions and point to a course of conduct well known to be binding on the parties concerned.

(1) Not to give armed assistance to either belligerent or allow to one side privileges denied to the other.

Others are indefinite and uncertain. Opinions and practices are divergent as to the matters with which they deal, and it is impossible to say that the actions of states with regard to them can be forecast with any degree of confidence. In the statements and discussions which follow we will endeavor to distinguish carefully between what is matter of undoubted obligation and what rests only upon disputed views of justice and expediency.

One of the most universally recognized duties of neutral states is

*Not to give armed assistance to either belligerent or allow to one side privileges denied to the other.*

This is involved in the very idea of neutrality. We have already traced the steps whereby a recognition of the fact that under ordinary circumstances a neutral cannot assist either belligerent with troops or ships became general among

civilized states ; and we have seen how the only question seriously debated in this connection for more than a century was whether limited succors might be given in pursuance of an antecedent engagement.<sup>1</sup> There is a great preponderance of modern opinion against such aid, which is obviously inconsistent with the duty of absolute impartiality in the treatment accorded to each of the parties to the struggle. For the last hundred years practice has squared with principle. Not only has there been no instance of the grant by a belligerent to a neutral of naval or military contingents under the provisions of a treaty made before the war, but even covenants to give far less marked assistance have been steadily discountenanced and are now unknown. Thus some of the provisions of the treaty of 1778 between the United States and France were a source of great embarrassment to Washington and his Cabinet when England and France went to war in 1793. The seventeenth and twenty-second articles gave to French ships of war and privateers the exclusive privilege of bringing their prizes into American ports; and provided that privateers of any nation at war with France should be forbidden to fit themselves therein, or sell their prizes or other merchandise, or buy more provisions than were necessary to enable them to reach the nearest port of their own country, whereas the privateers of France were free to do all these things.<sup>2</sup> Great Britain complained of the advantages accorded to her enemy ; and Washington's efforts to preserve a strict and self-respecting neutrality were seriously hampered by treaty obligations from which he could not escape. Negotiations were entered into with France on this and other matters. They were exceedingly complicated, and led at first to a rupture. But in 1800 they were brought to a successful termination by a convention which did not re-enact the objectionable stipulations of the treaty of 1778.<sup>3</sup>

<sup>1</sup> See §§ 244, 245.      <sup>2</sup> *Treaties of the United States*, pp. 301-303.

<sup>3</sup> *Treaties of the United States*, pp. 322-331 ; Wharton, *International Law of the United States*, §§ 148 a, 399.

The United States were thenceforth free to hold the balance even between warring powers ; and it has been the policy of other nations to obtain for themselves a similar liberty. At the present time a neutrality conducted on other principles would not be tolerated.

### § 254.

We will consider next the duty incumbent on neutral states

*Not to supply belligerents with money or instruments of warfare.*

By supplying belligerents with money or arms or stores neutral states would help them almost as much as if they had sent military or naval contingents. The reasons which justify the prohibition of the latter apply equally to the former. Neutral governments may neither give nor lend money to a belligerent government, and the gift or sale of arms, ships and other instruments of warfare is forbidden to them. Trading is not one of the ordinary functions of a national administration. A state contravenes its neutrality when it goes out of its way to make bargains with the agents of foreign and belligerent powers, for the purpose of transferring to them by a commercial transaction weapons which are certain to be used against the forces of a friend. A gratuitous transfer is still more reprehensible. It would be justly regarded as inconsistent with the condition of neutrality. But it may be doubted whether a government is bound to stop the periodical sales of old arms and stores from its arsenals, even though it has good reason to believe that agents from its belligerent neighbors will attend and buy. The more excellent way is to refrain from such transactions, especially when they are concerned with ships. When in 1863 the British Government discovered that owing to the sale of an old and unserviceable gunboat, called the *Victor*, to a private firm, it had found its

(2) Not to supply belligerents with money or instruments of warfare.

way into the hands of Confederate agents, orders were given that no more ships of the royal navy should be sold till the war was over.<sup>1</sup> A case on the other side occurred in the United States in 1870. Congress had passed an act two years before, authorizing the Secretary of War to sell such arms and stores as were unsuitable for use. Sales had commenced when the war between France and Germany broke out; and the administration saw no reason to discontinue them in consequence. Agents of the French Government made large purchases, which were paid for through a French Consul. From September to December, 1870, as many as 55 cannon and 378,000 muskets were exported from New York to France. In the following year the Senate of the United States appointed a committee to investigate the subject. Their report justified the action of the executive, on the ground that the sales were but the continuation of a series which had begun before the commencement of the war, and that, instead of any preference being given to the belligerents, persons suspected of being their agents were denied opportunity to purchase. It declared that the government did not know at the time of sale that those who bought were acting on behalf of France, but added that even if the head of the French state had appeared in person as a buyer it would have been lawful to sell to him in pursuance of a national policy adopted prior to the commencement of hostilities.<sup>2</sup> The case seems to have come very near the border between the permitted and the forbidden. It is possible to hold that as a matter of strict law the American Government was not absolutely bound to discontinue its sales, and yet to regret that a wider interpretation was not placed upon the undoubted obligation of giving no assistance to either party in the contest.

There can be no doubt that the gift or loan of money from a neutral government to a belligerent government is a

<sup>1</sup> British State Papers, *North America*, No. 2 (1873), pp. 104, 105.

<sup>2</sup> Wharton, *International Law of the United States*, § 391.

grave offence, and the same may be said of the guarantee by a neutral power of a loan issued by its belligerent friend. The conduct of the American envoys at Paris in 1798, when they refused on behalf of their government to consider the application of the Directory for a loan to France, then at war with Great Britain, was in strict accordance with International Law.<sup>1</sup> All the writers who touch upon the subject are agreed that it is a violation of neutrality for a state which is not a party to a war to lend money to one which is. The uncontroverted opinion of modern publicists, backed by the general custom of civilized states, constitutes a mass of authority from which there is no appeal. But, owing largely to neglect of the fundamental distinction between neutral governments and neutral subjects, a group of jurists of good repute extend the rule far beyond the practice on which it depends. Either they declare in so many words that neutral individuals may not lend money to belligerent states, or they use ambiguous phraseology which seems to include private persons within the scope of its prohibitions.<sup>2</sup> Never was a more unfounded doctrine set forth by able and learned men. Money is a form of merchandise, and neutral individuals constantly trade in it with belligerent governments. It can be transferred with the greatest ease, far more easily, in fact, than other commodities. Commercial transactions in it could not be prevented, except by an amount of espionage and interference which would outrage human nature and render all trade impossible. No war of any magnitude takes place without a free resort by the combatant powers to neutral money markets. The stock in loans issued to provide funds for the conflict is bought and sold in other countries, just as freely as shares in foreign mines

<sup>1</sup> Wharton, *International Law of the United States*, §§ 148 a, 390.

<sup>2</sup> e.g. Bluntschli, *Droit International Codifié*, § 768; Calvo, *Droit International*, § 2331; Halleck, *International Law*, Ch. XXIV., § 15; Phillimore, *International Law*, III., § CLI.; Kent, *Commentary on International Law*, (Abdy's ed.), Ch. VIII.



and railways. At the present moment (August, 1894) the belligerent governments of China and Japan are besieged by offers of money from groups of European investors. When practice points entirely in one direction it is idle to pit against it a so-called rule based on nothing better than the statement that gold is a prime necessity in war. It certainly is; and nearly all agree that a belligerent may lawfully confiscate any supplies of it he may find in a neutral vessel on its way to his enemy. Money is contraband of war, and must be treated like other articles in the same category.<sup>1</sup> The neutral trader in it lends at his own risk, but he commits no breach of the common law of nations by lending, and his government is under no obligation to attempt the impossible task of preventing him. When in 1823, the British Cabinet consulted its law officers as to the legality of subscriptions and loans "for the use of one of two belligerent states by individual subjects of a nation professing and maintaining a strict neutrality between them," it received in reply an opinion to the effect that voluntary subscriptions of the nature alluded to were inconsistent with neutrality and contrary to the law of nations. But with respect to loans the distinguished lawyers consulted, among whom was Copley, afterwards Lord Lyndhurst, declared that "according to the opinion of writers on the law of nations and the practice which has prevailed, they would not be an infringement of neutrality." The documents in which these views are embodied are printed at length by Sir Sherston Baker in a note to his edition of Halleck;<sup>2</sup> but they certainly give no support to the opinions expressed in the text of the book against the legality of commercial transactions in money between neutral individuals and belligerent governments. Even in deciding, and rightly deciding, that voluntary gifts and subscriptions were illegal, the British law officers took care to add that the belligerent against whom they were directed would not have the right to consider

<sup>1</sup> See §§ 277-279.

<sup>2</sup> *International Law*, II, 195-197.

them as constituting an act of hostility on the part of the neutral government. Moreover, they abstained from recommending a prosecution of the subscribers on the ground that it would be almost certain to fail. There has never been any question among competent authorities of instituting legal proceedings against neutral subjects concerned in floating loans for belligerents or taking stock therein. The utmost extension of the obligations of neutral states in this matter can make them go no further than the prohibition of any assistance direct or indirect on the part of their executive officers. This applies to sales of arms, stores and instruments of warfare, as well as to loans of money. In 1885 Mr. Bayard, then Secretary of State at Washington, instructed the American Consul-General at Shanghai to withhold consular intervention, where it was necessary in order to effect a valid transfer of American-owned steamers to the Chinese Government for use against France in the hostilities then raging between the two countries.<sup>1</sup> Nothing more could be required by the most exacting belligerent. A neutral administration which refrains from such transactions itself, and refuses official aid and countenance to any of its subjects who take part in them, has fulfilled its entire duty.

### § 255.

A curious instance of the growth of opinion in matters of international concern is afforded by the obligation of neutral states

*Not to allow belligerents to send troops through their territory or levy soldiers therein.*

It is now acknowledged almost universally that a neutral state which permits the passage of any part of a belligerent

<sup>1</sup> Wharton, *International Law of the United States*, § 393.

army through its territory is acting in such a partial manner as to draw down upon itself just reprobation, and with regard to permission to recruit a still stronger feeling exists. Yet Grotius laid down that a right of passage existed and might be taken by force if denied without just cause,<sup>1</sup> and

(8) Not to allow belligerents to send troops through their territory or levy soldiers therein.

Vattel declared that it was no breach of neutrality to permit levies of troops in favor of a belligerent, if they did not form his principal strength.<sup>2</sup> The Swiss publicist discussed also the question of a right of passage. He reasoned about it at great length, and came to the conclusion that the belligerent should always ask it of the neutral and never presume to take it by force, except under stress of extreme necessity or when the refusal was on the face of it unjust. In all other cases the denial of the neutral state must be conclusive; but if it gave the required permission it was guilty of no offence, provided that it was ready to grant a similar passage to the opposing troops at the request of their government.<sup>3</sup> This doctrine is still to be found in the works of writers of repute. Wheaton, for instance, admits a right of passage, but calls it an imperfect right, by which he means that it cannot be enforced against the will of the neutral,<sup>4</sup> and Manning declares that it may be granted without an infraction of neutrality as long as it is given impartially to both sides.<sup>5</sup> But, as Hall points out, the more recent writers express a contrary opinion,<sup>6</sup> and there can be little doubt that they are right. Such a grant of passage is in its own nature incapable of impartial distribution, however blameless may be the intentions of the neutral who grants it. In the crisis of a great war it may be a matter of life and death to one belligerent to pass a body of troops

<sup>1</sup> *De Jure Belli ac Pacis*, Bk. II., II., XIII., and Bk. III., XVII., II.

<sup>2</sup> *Droit des Gens*, III., § 110.

<sup>3</sup> *Ibid.*, III., §§ 119-134.

<sup>4</sup> *International Law*, § 427.

<sup>5</sup> *Law of Nations* (Amos's ed.), Bk. V., Ch. II.

<sup>6</sup> *International Law*, § 219.

across an outlying portion of neutral territory, whereas the other may never be placed in a similar position through the whole course of hostilities. It would be little consolation to him in the midst of defeat and ruin to be told that he would have received the same privileges as his adversary, had the conditions been reversed. Moreover, the permission is of necessity given to further a warlike end, and is therefore inconsistent with the fundamental principle of state-neutrality. These considerations have influenced practice during the present century, and the weight of modern precedent is against the grant of passage in any case. In 1815 permission was extorted from the unwilling Swiss for the passage of Austrian troops through the territory of the Confederation on their way to invade Southeastern France.<sup>1</sup> But in 1870 the government of the Republic would not allow bodies of Alsatian recruits for the French army to cross her frontiers. In the same war Belgium declined to give permission to the Germans to send their wounded home over her railways, on the ground that to relieve the congestion of their lines of communication with their own country would enable them to bring up troops and stores more easily for the reinforcement and support of the armies invading France.<sup>2</sup> There was some controversy at the time as to whether this was not an undue and over-scrupulous extension of neutral duties. France, however, declared that she would regard the passage of German wounded over Belgian territory as a breach of neutrality; but in 1874 her representative at the Brussels Conference was able to assent to the guarded doctrine contained in the Military Code then drawn up. Article 55 declared that "the neutral state may authorize the transport across its territory of the wounded and sick belonging to the belligerent armies, provided that the trains which convey them do not carry either the *per-*

<sup>1</sup> Wheaton, *International Law*, §§ 418, 419.

<sup>2</sup> Rolin-Jacquemyns, *La Guerre Actuelle* in the *Revue de Droit International*, Vol. II., pp. 708, 709.

*sonnel* or the *matériel* of war.”<sup>1</sup> In 1877 the United States strongly remonstrated with the Government of Mexico on account of the violation of the Texan frontier by a body of troops who pursued some flying insurgents on to American soil, and there attacked and dispersed them.<sup>2</sup> The only instance of permission in recent times is afforded by Roumania at the commencement of the Russo-Turkish war of 1877. Just before the outbreak of hostilities the Russian and Roumanian Governments negotiated a convention by which the former agreed to give the troops of the latter free passage through its territory on their march to the Danube for the purpose of invading European Turkey.<sup>3</sup> They were to have the use of all railways, roads and telegraphs, but were not to pass through Bucharest, the Roumanian capital, nor to interfere with the internal affairs of the state. The Russian commanders were responsible for the good order of their soldiers, and were to pay for all supplies they took from the country. In pursuance of this agreement at least half a million Russian troops passed through Roumania during the war, and crossed the Danube into Bulgaria. The case looks at first sight like an important reversion to the old practice; but on closer examination it proves to be an utterly anomalous proceeding which cannot be drawn into precedent on one side or the other. The only purpose it serves is to illustrate afresh that strange divorce between diplomatic theory and concrete fact which is a prominent feature of the complicated group of problems called by Europe the Eastern Question. Technically Roumania was a part of the Turkish Empire, and therefore the entry of Russian troops into Roumanian territory was in law an invasion of Turkey. In reality Roumania was a self-governing state, whose nominal subjection to Turkish suzerainty scarcely concealed its practical independence. It recognized in the Russian attack on

<sup>1</sup> British State Papers, *Miscellaneous*, No. 1 (1875), p. 324.

<sup>2</sup> Wharton, *International Law of the United States*, § 397.

<sup>3</sup> Fyfe, *Modern Europe*, III., 497.

Turkey an opportunity for severing the scanty ties that still bound it to the Sultan; and therefore it aided Russia, first by allowing the passage of the invading troops, and soon afterwards by joining in the war with its whole army. No valid argument can be drawn from the occurrence in opposition to the modern doctrine that a neutral state is bound to close its frontiers against the armies of both belligerents.

In discussing the obligation of the belligerent to submit to the interning of its soldiers should they be driven into neutral territory,<sup>1</sup> we have already seen that it is the duty of the neutral to intern them. The Brussels Conference of 1874 laid down with precision the course he is bound to adopt.<sup>2</sup> He ought not to refuse an asylum to beaten troops; but the plainest principles of neutrality forbid him to allow them to retain their arms, or go forth when the danger is past and take a fresh part in the war. They are not likely to bring prisoners with them; but victorious naval forces sometimes put into neutral ports with the crews of captured vessels detained in custody on board. Whatever may be the circumstances under which prisoners of war are brought into the territorial waters of neutral states, the authorities of the port have no right to interpose on their behalf as long as they remain in the ship of their captors. Their detention is part of the internal economy of the vessel, which is regulated by the laws of the state to which it belongs. But if they escape, the local sovereign must not permit their recapture within his jurisdiction by agents of the belligerent, still less can he arrest and return them by means of his own officers without forfeiting all claim to be considered as neutral in the contest.

The question of levying troops is simple. In the seventeenth century it was thought no infraction of neutrality for permission to recruit to be given by a state to one or more of its neighbors who were engaged in war. In the

<sup>1</sup> See § 251.

<sup>2</sup> British State Papers, *Miscellaneous*, No. 1 (1875), p. 324.

eighteenth century a good deal of doubt was felt on the subject. Vattel, whose views have been already alluded to, held that a neutral state might lawfully permit such levies if it was part of its settled policy to do so, and that the belligerent who suffered had no right to complain, even when denied a similar privilege, unless the troops so obtained formed the principal strength of its enemy, and were raised for the invasion of his territories or the defence of a manifestly unjust cause.<sup>1</sup> These opinions of the great Swiss writer were probably tinged by sympathy with his compatriots, who made a practice of supplying other powers with troops. The quickened sense of neutral obligations which arose about the end of the century led to a far less lenient view. Publicists declared levies of troops in the territory of other states to be forbidden to a belligerent, and held that a neutral government which permitted them was guilty of a gross breach of International Law. For a time Switzerland remained the only state which sent contingents to foreign armies. She was in the habit of concluding treaties called capitulations, whereby she covenanted to supply other powers with a fixed number of troops. A mutiny of Swiss soldiers in the Neapolitan service and various other occurrences forced the question of these capitulations to the front in 1859. Great Britain and other powers made representations on the subject, and induced the government of the Confederation to pass a law forbidding its citizens to take service in foreign armies, and making it an offence for foreigners to enroll Swiss contingents.<sup>2</sup> This put a stop to proceedings inconsistent with the position of Switzerland as a neutralized state and contrary to modern ideas of international duty. There is little prospect of any revival of such practices among civilized nations.

<sup>1</sup> *Droit des Gens*, III., § 110.

<sup>2</sup> Manning, *Law of Nations*, Bk. V., Ch. I; Halleck, *International Law* (Baker's ed.), II., 60, note 1; Bury, *La Neutralité de la Suisse* in the *Revue de Droit International*, Vol. II., pp. 636-642.

## § 256.

Neutral states are bound to impose other restraints than those we have just considered. It is their duty

*Not to permit belligerent agents or their own subjects to fit out warlike expeditions within their dominions, or increase therein the warlike force of any belligerent ship or expedition.*

In discussing the obligations of a belligerent towards neutral governments we endeavored to determine with as near an approach to precision as the infinitely variable circumstances of warfare will permit, what constitutes an armed expedition.<sup>1</sup> It is not necessary to repeat now what was said then. Assuming it to be borne in mind, we go on to state that just as powers at war are bound to refrain from fitting out such expeditions in the territory and territorial waters of powers that remain at peace, so the latter are bound to take active measures to prevent the issue from any part of their dominions of naval or military forces organized therein for the purpose of fighting against one belligerent in the interests of the other. They owe it as a duty to themselves and to the whole family of nations to keep their neutral rights inviolate, whether force or fraud be the weapon used against them. Moreover, the belligerent who suffers from any remissness in this respect would have just ground of complaint against the offending government.

Augmentations of warlike force are as clearly forbidden in neutral territory as original equipments. This applies to armed expeditions, and also to ships of war, which are a species of armed expedition. International Law imposes upon neutral states the obligation of using all reasonable means to prevent such acts as the increase of the armament

(4) Not to suffer belligerent agents or their own subjects to fit out armed expeditions within their dominions, or increase therein the warlike force of any belligerent ship or expedition.

<sup>1</sup> See § 250.



of any belligerent vessel of war in their waters or the recruitment of fighting men for its crew. Reference is made to this duty in the second of the three rules of the Treaty of Washington,<sup>1</sup> under which Great Britain was condemned in damages on account of the clandestine augmentation of the warlike force of the *Shenandoah* by the enlistment of men for her crew in the port of Melbourne.<sup>2</sup> Whatever opinions may be held as to some of the requirements of the three rules, there can be no doubt that in exacting from neutrals proper vigilance for the prevention of such proceedings as those of the Confederate cruiser in the Australian port they did not go beyond existing and admitted law. Long before 1865 it had been recognized that a belligerent vessel ought not to leave a neutral port a more efficient fighting-machine than she entered it, and wise neutrals had armed their executive government with power to prevent infringement of their sovereignty in this respect. The American Foreign Enlistment Act of 1818 dealt with the case of armed vessels which at the time of their arrival within American waters were ships of war in the service of belligerents, and forbade any person within the territory or jurisdiction of the United States to increase the number of their guns, change them for guns of a larger calibre, or add "any equipment solely applicable to war." It also forbade enlistment on board any such vessel, except when the persons enlisted were subjects of the state owning the vessel and were transiently in the United States.<sup>3</sup> The British act of the following year contained similar provisions, and did not make any exception in favor of the enlistment of belligerent subjects.<sup>4</sup> In these respects its provisions were re-enacted by the Foreign Enlistment Act of 1870, which superseded it and is the

<sup>1</sup> See § 263.

<sup>2</sup> *Award of the Geneva Arbitrators*, for which see Wharton, *International Law of the United States*, § 402 a, or British State Papers, *North America*, No. 2 (1873), p. 4.

<sup>3</sup> *Fifteenth Congress*, Sess. 1, Ch. VIII.

<sup>4</sup> 59 Geo. III., c. 69.

neutrality statute now in force in the United Kingdom.<sup>1</sup> It must, however, be remembered that the municipal laws of an independent state are not the measure of its international obligations. They may go beyond or fall short of the duties it owes to other powers. In the first case belligerents cannot complain if the neutral does not act up to the strictness of its own statutes, provided that it performs on their behalf all it is bound to do by the common law of nations; and in the second case the neutral cannot evade responsibility for any shortcomings of which it may be guilty by the plea that it has fulfilled all the requirements of its own law. We cannot argue from the presence of a rule in a neutrality statute to its presence in International Law. But when, as in the case before us, other evidence shows that the rule in question is part of the international code, its enforcement by municipal statute gives it additional authority.

### § 257.

We have seen that neutral states are bound to restrain the activity of agents of the warring powers in several important particulars. We have also seen that their own subjects share the prohibitions laid upon belligerents in connection with the fitting out of expeditions, the recruitment of men and the increase of the warlike force of vessels. In some respects their duty with regard to the former is larger than their duty with regard to the latter. They may not prevent belligerent subjects from leaving their territory in order to take service in one or the other of the hostile armies or navies, but they are bound

(5) Not to permit their subjects to enter the military or naval service of the belligerents or accept letters of marque from them.

*Not to permit their subjects to enter the military or naval service of the belligerents or accept letters of marque from them.*

This rule applies not only to the enlistment of neutral subjects within neutral territory, but also to their departure

<sup>1</sup> 33 and 34 Vict., c. 90.

from their country in order to enlist abroad. It is not implied for a moment that the government of a neutral country is obliged to keep watch over each unit of its population, and can be made responsible if a man here and another there crosses its frontier for the purpose of taking service with a belligerent. These things cannot be prevented and are too small to be matters of serious concern. But anything like recruiting on a large scale within neutral territory can be easily discovered, and should be put down at once; and a moderate amount of vigilance will enable an administration to detect and prevent the issue of its subjects from its shores in a continuous stream in order to enlist outside its jurisdiction in the service of either belligerent. The government of St. Petersburg was well aware in 1876 that thousands of enthusiastic Russian volunteers were pouring across the southern borders of its dominions in order to join the Serbian army, then engaged under a Russian general in warfare with the Turks.<sup>1</sup> But it made no effort to restrain them, and was undoubtedly guilty of a breach of neutrality towards Turkey. Popular feeling would have made restrictive action difficult, if not impossible. It was stirred to its depths by sympathy with oppressed co-religionists, and was not long before it brought about a war for their liberation. The executive authorities of other nations have sometimes been hampered in a similar way, when they were actuated by a more sincere desire to fulfil their neutral obligations than was shown by the Russian administration on the occasion to which we have referred. American sympathy with France made the task of Washington, in preserving an impartial neutrality between her and Great Britain in the war which broke out in 1793, far more difficult than it need have been. The feeling in favor of the Canadian insurgents in 1838, and of Ireland during the Fenian troubles, produced occurrences which weakened the position of the United States in international controversy; while the sympathy of a large propor-

<sup>1</sup> Fyffe, *Modern Europe*, III., 489; *Annual Register for 1876*, pp. 280-283.

tion of the official classes in England with the Southern Confederacy in the American Civil War helped to bring about a feebleness of executive action which in the end cost the country dear. But though a duty may be difficult, its performance cannot be dispensed with on that account. No state can plead in bar of just demands for satisfaction that its people were determined to prevent their rulers from fulfilling their international obligations.

The offer of letters of marque to neutral seamen by a belligerent has been forbidden by International Law for more than a century; and neutral governments have taken upon themselves the duty of preventing the acceptance of such commissions by their citizens. The general observance of the Declaration of Paris of 1856 has deprived the subject of practical importance. When states are bound not to employ privateers at all, it is clear that they cannot offer privateering commissions to neutral subjects. The few powers which have not signed the Declaration are technically untrammelled by such restrictions; but the public opinion of the civilized world is so strongly opposed to irregular hostilities carried on by neutral subjects that there is little chance of their availing themselves of the liberty they nominally possess. In the one instance since 1856 when anything of the kind was attempted, no applications for the proffered letters of marque were made.<sup>1</sup> The United States, which is by far the most important of the non-signatory powers, has shown a disposition to go beyond the ordinary law on the subject and regard as piracy the capture of vessels belonging to one belligerent by neutral privateers in the service of the other. Not only have its citizens "been forbidden by statute to take part in the equipment or manning of privateers to act against nations at peace with the United States," but in addition "treaties, making privateering under such circumstances piracy, have been negotiated with England, France, Prussia, Holland, Spain and Sweden."<sup>2</sup> Some of

<sup>1</sup> See § 223.      <sup>2</sup> Wharton, *International Law of the United States*, § 385.

these have been abrogated; but enough remain to indicate a settled policy, and they have been reinforced by others concluded in recent times with the republics of South and Central America.

### § 258.

The last of the obligations laid upon neutral states is

*To make reparation to belligerents who may have been seriously and specifically injured by failure on their part to perform their neutral duties.*

It used to be held that a belligerent state had no legal claim on a neutral for redress, because none of its rights were violated by such infractions of neutrality as we have been considering. Neutral sovereignty was defied and the integrity of neutral territory set at naught when armed expeditions were fitted out or captures made within it; but between the belligerents there was nothing but force, and consequently no wrong was suffered by the side which succumbed to force. This was the argument; and abundant instances of its application can be culled from American as well as British sources.<sup>1</sup> But it involves the curious fallacy that when International Law gives a state certain rights, the neglect of which may seriously injure another state, the latter is not entitled to demand from the former a due insistence upon them. It is a grave error to suppose that neutrals are endowed with large privileges and armed with large powers to use or toss away as they please. Their duty is to vindicate their neutrality.<sup>2</sup> Respect for it is not a matter between them and the offending belligerent only. It concerns the whole family of nations, and most of all the power which is most likely to be injured by a failure

(6) To make reparation to belligerents who may have been seriously and specifically injured by failure on their part to perform their neutral duties.

<sup>1</sup> See *Historicus on Belligerent Violation of Neutral Rights*.

<sup>2</sup> Heffter, *Droit International*, § 146; Bluntschli, *Droit International Codifié*, § 781; Calvo, *Droit International*, § 2338.

to insist upon it. No fine-spun theory can silence the voice of an aggrieved nation. It always does and always will complain when it is hindered in its war by neutral partiality or neglect. The late Lord Bowen summed up the question well, when in a pamphlet on the Alabama Claims published in 1868 he wrote: "Some people have hinted that the North has no rights at all in the business. The rights violated (so runs the argument) are those of the neutral only. May not the neutral do what it pleases him with his own? If this were excellent learning it would be indifferent sense. In spite of local juriconsults, America will still be of opinion that she was very closely concerned with the uninterrupted equipment in English ports of cruisers like the *Alabama*."<sup>1</sup> The result of the Geneva Arbitration of 1872 went far to remove any lingering doubt as to neutral responsibility. When Great Britain was cast in heavy damages because of her failure to fulfil certain obligations which in the opinion of the Arbitral Tribunal were imposed upon her by her neutrality, it was impossible any longer to contend that an injured belligerent had no claim upon the power whose executive was too weak or too careless to enforce its neutral rights. The principle of reparation must be regarded as having been definitely embodied in the international code.

But, while the principle is unquestioned, its application is by no means free from difficulty. The exact nature of the reparation to be given cannot be fixed by legal rule. It must vary with circumstances, and what is appropriate in each case must be settled by negotiation between the powers concerned. If property is found within the jurisdiction of a power whose neutrality was violated by its capture, it must be restored to its original owners. If such a remedy is impossible or inapplicable, pecuniary compensation should be given. International controversies are frequently settled by the payment of damages; and when the parties concerned

<sup>1</sup> Quoted by Lord Justice Davey in the *Law Quarterly Review* for July, 1894, p. 214.

have been unable to agree upon the amount, they have often left it to be determined by a board of Arbitrators. Claims for remote or consequential damages are generally regarded as inadmissible. In the course of the *Alabama* controversy the United States demanded from Great Britain compensation for the addition of a large sum to the cost of the war, the enhanced payments of insurance on sea-borne goods and the transfer of the American commercial marine to the British flag. When these were ruled out by the Arbitrators, a claim for the expense of pursuing the *Alabama* and her sister cruisers was pressed, but the Geneva Tribunal decided against it as not being "properly distinguishable from the general expenses of the war carried on by the United States."<sup>1</sup> These decisions have been approved by jurists, and are generally regarded as sound interpretations of accepted law. We may take it as settled that the injuries for which a belligerent can demand compensation from a neutral must be immediate and specific. They must also be serious. The cumbrous machinery of international complaint should not be set in motion for trivial causes. The complicated organization of modern society, and the ease with which subjects of different states can hold communication with each other and move from place to place, renders it impossible for any executive, however careful, to prevent small infractions of neutrality on the part of isolated individuals. It cannot be held responsible for what it is unable to control. Some lack of reasonable vigilance, some element of negligence or some wilful omission, must be proved against it before it can be considered liable.

### § 259.

This brings us to the difficult question of the amount of care that can justly be demanded by a belligerent from a neutral government in matters connected with the enforcement of respect for its neutrality.

The measure of  
"due diligence."

<sup>1</sup> Wharton, *International Law of the United States*, § 150 g.

The first and third of the three rules of the Treaty of Washington of 1871 declared that neutrals were bound to use "due diligence" to prevent various acts the nature of which we shall soon discuss. Immediately a controversy arose as to the true meaning of this phrase. By what standard was "due diligence" to be measured? What amount of care did it imply? The American answer to these questions is to be found in the third part of the case of the United States laid before the Geneva Tribunal. The essence of it is contained in the statement that diligence in order to be due must be "commensurate with the emergency or with the magnitude of the results of negligence." The British case set forth that "Due diligence on the part of a sovereign government signifies that measure of care which the government is under an obligation to use for a given purpose. This measure, when it has not been defined by international usage or agreement, is to be deduced from the nature of the obligation itself, and from those considerations of justice, equity and general expediency on which the law of nations is founded."<sup>1</sup> This definition can hardly be esteemed a success. We ask for a measure of neutral obligation, and we are told that it is to be "deduced from the nature of the obligation itself," that is, from the very thing to be measured. Nor is the American definition much more satisfactory. A rule which varies with the objects to which it is applied is not a useful guide in emergencies. The Arbitrators, however, accepted the principle of a changing standard, and embodied a most pronounced rendering of it in their Award. In the second of their recitals they laid down the proposition that "due diligence" ought to be exercised by neutral states "in exact proportion to the risks to which either of the belligerents may be exposed from a failure to fulfil the obligations of neutrality on their part."<sup>2</sup> This is the least happy of all the attempts to discover a

<sup>1</sup> British State Papers, *North America*, No. 1 (1872), p. 24.

<sup>2</sup> Wharton, *International Law of the United States*, § 403 a.



standard of neutral obligation. It imposes different degrees of responsibility upon different neutrals in the same war, and even upon the same neutral in respect of different belligerents in the same war, and thus destroys that impartiality which is the essence of neutral duty.

The subject is no doubt difficult. A full discussion of it would involve an examination of the doctrine of *culpa* from its source in the law of ancient Rome down to the present time. Much information concerning it will be found in the *American Case* and in the *Reasons of Sir Alexander Cockburn for Dissenting from the Award*. Considerations of space forbid a long digression in order to deal with matters some of which are hardly relevant to the issue before us. We must be content to point out that what is wanted is some fixed standard of diligence, which shall be the same for all neutral states and shall impose on them the same measure of duty towards all belligerents. In order to supply this need it is necessary to discover an equivalent in international affairs of the *bonus et diligens paterfamilias* of the scientific jurists. The care shown by such a person in his own affairs was the measure of the *diligentia* which a man was bound to show when the interests of others were entrusted to his keeping, and the want of it was the *culpa* for which he was liable before the law. Now if we substitute for the *bonus paterfamilias* the *bona civitas*, all that remains to be done is to point out some branch of the ordinary work of an executive which bears close resemblance to the task of preserving neutrality in time of war. If this can be discovered, then the care which a well-governed state takes in the performance of the former will be the measure of the diligence to be exacted from the latter. We have not far to look in order to find what we seek. In nine cases out of ten attempts to use neutral territory for warlike purposes are connected with coasts and ships and maritime affairs. The same may be said of smuggling, which is the breach of municipal law most nearly resembling in character and modes of operation such ordinary

breaches of neutrality as the secret equipment of expeditions and cruisers, or the underhand increase of their fighting force. Here then is the standard we are in quest of. The kind and amount of diligence which a strong and careful government would use to put down smuggling ought to be used by neutral states to fulfil the obligations of their neutrality. It is not pretended that this measure of due diligence has been adopted by states and made a part of the law which regulates their mutual intercourse. No general agreement on the subject has been arrived at. The suggested standard is put forth as an attempt to solve a difficult question, which has arisen in recent times to vex the peace of nations, and has not hitherto received a satisfactory answer.

### § 260.

A case which occurred early in the present century, during the war between Great Britain and the United States, raised, but can hardly be said to have settled, the question whether a belligerent vessel which resists hostile attack in neutral waters deprives its government thereby of the right of redress from the state in whose jurisdiction the outrage was committed. In the year 1814, the American privateer *General Armstrong* was destroyed in the neutral Portuguese harbor of Fayal in consequence of the action of a British squadron under Commodore Lloyd. The United States held Portugal responsible and demanded compensation for the owner of the privateer. Their claims were resisted, and after a long diplomatic correspondence the matter was referred in 1851 to the arbitration of Louis Napoleon, then President of the French Republic. In November, 1852, he decided that the American Government was not entitled to any redress from Portugal, because the crew of the privateer did not apply "from the beginning for the intervention of the neutral sovereign," but began the conflict by firing upon some British boats which approached their vessel in the night.

The consequences  
of resistance to  
unlawful attack  
in neutral waters.

He held that by this conduct, Captain Reid of the *General Armstrong* had "failed to respect the neutrality of the territory of the foreign sovereign, and released that sovereign of the obligation in which he was, to afford him protection by any other means than that of a pacific intervention."<sup>1</sup> The government of the United States did not consider the facts on which the award was based to have been adequately proved, and Congress voted an indemnity to the owners of the destroyed vessel. The doctrine involved in the decision has been accepted in all its fulness by British publicists,<sup>2</sup> while American jurists have been disposed to deny or qualify it.<sup>3</sup> A close examination of the case leads to the conclusion that the award was right, but the principle of the decision wrong. Whatever may have been the original intention of the British commander, there is little doubt that the armed conflict was commenced by the crew of the American vessel, though it was afterwards renewed by their enemies in utter disregard of the rights of Portugal. Both sides placed themselves in the wrong, and those who eventually suffered had little claim to redress from the neutral whom they had injured. But when it is broadly stated that a belligerent who defends himself from hostile attack in neutral territory frees the neutral sovereign from all responsibility, we may venture to suggest a doubt. The side which fights purely in self-defence can hardly be considered as *particeps criminis*, and therefore disentitled to redress. Undoubtedly the vessel or force attacked ought to appeal immediately to the neutral for protection; and, if it neglects to do so when ample means are at hand, the so-called rule might apply. But in cases where either the will or the power to protect is wanting, the elementary right of self-defence surely comes into play.<sup>4</sup>

<sup>1</sup> Wharton, *International Law of the United States*, § 227.

<sup>2</sup> e.g. Hall, *International Law*, § 228.

<sup>3</sup> e.g. Dana, note 208 to Wheaton's *International Law*.

<sup>4</sup> For an account of the case of the *General Armstrong*, see Calvo, *Droit International*, § 2359; and Wheaton, *International Law* (Lawrence's ed.), note 217.

## § 261.

We have seen that a neutral state is bound to prevent the fitting out of warlike expeditions within its jurisdiction for the service of one of the belligerents against the other. In connection with this duty the question arises whether a ship built and equipped for warlike purposes is to be placed on the same footing as an expedition. If she is regarded merely as a weapon, the neutral government will be under no obligation to prevent her departure from its waters. As contraband of war, she will be subject to capture and confiscation by the belligerent against whom she is to be used ; but the authorities of the neutral country will not be held responsible for her in any way.<sup>1</sup> If, on the other hand, she is deemed to be in the same legal position as an expedition, they are liable for any negligence or partiality which may result in her unmolested departure or a subsequent augmentation of her warlike force within their dominions. The problem thus presented is very difficult and very important. It did not arise till the quickening of the sense of state-duty in the matter of neutrality at the end of the eighteenth century led the government of the United States in 1793 to make exceptional efforts for the protection of its own sovereign rights from violation by either of the warring parties and for the preservation of absolute impartiality between them.<sup>2</sup> Fresh powers were demanded by the executive and granted by the legislature, first in America and soon afterwards in Great Britain. The Foreign Enlistment Acts of the two countries, passed in 1818 and 1819 respectively, are municipal statutes, and cannot be regarded as conclusive evidence of international obligation. They show, however, that this latter was developing, and that the governments concerned wished to keep pace with its growth and arm

The difficulty with regard to ships armed and equipped in neutral waters for the warlike purposes of a belligerent.

<sup>1</sup> See § 277.

<sup>2</sup> See § 244.

themselves with powers sufficient for the fulfilment of the duties imposed upon them. But what were those duties? In the United States a long series of judicial decisions produced a body of doctrine which dealt with almost every possible combination of circumstances connected with the fitting out, arming and equipping of belligerent ships in neutral waters. The revolt of the Spanish Colonies, and the sympathy felt for the insurgents by all sections of the American people, produced endless efforts to violate American neutrality, and provided the Supreme Court in the great days of Marshall and Story with a large number of cases under the Foreign Enlistment Act of 1818. In Great Britain, on the contrary, there was but one case under the corresponding act of 1819, before the outbreak of the Civil War between the two sections of the American Union, and the attempts of the South to fit out cruiser after cruiser in English ports, forced upon the statesmen and judges of the United Kingdom the duty of interpreting their own statute and defining their views of international obligation in matters connected with neutrality. The general opinion appears to have been that a ship adapted for war was merely an article of contraband trade, unless she left the neutral port in a condition to commence hostilities the moment she passed beyond territorial waters and entered the high seas. In that case, and in that case only, was the neutral under an obligation to prevent her exit. This was the doctrine laid down in 1863 by Chief Baron Pollock and Baron Bramwell of the Court of Exchequer in the case of the *Alexandra*,<sup>1</sup> though the latter admitted that his decision would allow a vessel to leave a neutral port ready for war in all respects except her armament, and the armament to be sent at the same time in another vessel which should put it on board beyond the marine league. "Thus," said he, "the spirit of International Law may be violated." But nevertheless he held that by the terms of the Foreign Enlistment Act he was obliged

<sup>1</sup> Hurlstone and Coltman, *Exchequer Reports*, II., 481.

to put this unsatisfactory interpretation upon its provisions.<sup>1</sup> Owing to various technicalities the case of the *Alexandra* could not be carried to a satisfactory conclusion, and after a detention of a year at Liverpool the vessel was released. She was again seized on a fresh charge at Nassau in 1864, and the proceedings on the second trial were not finished when the Confederacy fell. The action of the British Government with regard to this vessel, together with its purchase of the two iron-clad rams which Messrs. Laird & Co., of Birkenhead, were more than suspected of building to the order of Confederate agents, its seizure of the *Pampero* in the Clyde, and its stoppage of the sale of the Anglo-Chinese gunboats against the advice of its own law officers,<sup>2</sup> goes far to show that the rulers of the United Kingdom had uneasy doubts as to the validity of the doctrine laid down in their law-courts and maintained in their despatches. If it were correct, nothing would be easier than to fit out belligerent vessels of war in neutral ports. The ship herself could leave unarmed. Her guns could follow her immediately on another vessel built for commercial purposes, or could be sent at the same time in such a vessel from an adjacent port. The two could meet on the high seas just outside neutral jurisdiction, and there combine the scattered elements of armament, so as to make an efficient cruiser, ready from that moment to pursue her career of destruction. This is what really happened in the case of the *Alabama*. She escaped from Liverpool on July 29, 1862, unarmed and without a fighting crew, but nevertheless built and equipped for war rather than for commerce. Part of her crew left Liverpool the next day in the tug *Hercules*, and joined her in Mœlfra Bay near Beaumaris; while the remainder, with Captain Semmes, her commander, and a portion of her armament, cleared from Liverpool in the *Bahama* on August 13. About the same date the rest of her armament was sent from London in the barque *Agripina*.

<sup>1</sup> Wheaton, *International Law* (Dana's ed.), pp. 567-571, note.

<sup>2</sup> British State Papers, *North America*, No. 2 (1873), pp. 102-106.

On August 18, the *Bahama* joined the *Alabama* off Terceira, one of the Azores, and found the *Aggripina* already there. The guns, armament and fighting crew were then transferred to the *Alabama*, the commission of Captain Semmes produced, the Confederate flag run up, and the cruise of the famous commerce-destroyer commenced. Similar proceedings occurred in other cases. The *Florida*, the *Georgia* and the *Shenandoah* left British ports unarmed, and the men and weapons which enabled them to carry on hostilities were forwarded from other British ports to a rendezvous previously agreed upon.<sup>1</sup>

It is not necessary to go back upon settled controversies, and enter into what is after all merely an antiquarian discussion as to whether the International Law of 1861-1865 forbade the departure from neutral waters of ships fitted out therein for a belligerent, only when they were ready to commence hostilities the moment they were outside neutral jurisdiction, or whether the prohibition was wider and extended, as the United States held, to all vessels which could by any reasonable construction of evidence be looked upon as intended for warlike purposes. The curious in such matters will find a literature voluminous enough to occupy the best years of their lives in the books, pamphlets, speeches and despatches poured forth for more than ten years on both sides of the Atlantic, in elucidation of one phase or another of the complex series of international difficulties generically termed the *Alabama Question*. The controversy was summarized from an American point of view by Mr. Caleb Cushing in his *Treaty of Washington*, and by Professor Mountague Bernard from a British point of view in his *Historical Account of the Neutrality of Great Britain during the American Civil War*. It covered a vast field and dealt with many other points besides that which we are now dis-

<sup>1</sup> For a full and complete history of these vessels, see the documents presented before the Arbitral Tribunal at Geneva, especially the British and American *Cases and Counter-cases*.

cussing. Looking back on it after an interval of more than twenty years, we can hardly fail to be struck with the extent to which the passions of the moment blinded good and able men to what seem to us obvious considerations of equity. On one side we find a tendency to rely upon technical subtleties and substitute legal quibbles for substantial justice, and on the other a disposition to magnify grounds of offence and seek causes of quarrel in acts hitherto deemed perfectly innocent. It cannot be doubted that, in the matter of arming and equipping belligerent ships in neutral waters, the older authorities, including several who belonged to the United States, supported the British view.<sup>1</sup> It is equally clear that many modern writers hold the stricter doctrine put forward in the controversy by the American advocates.<sup>2</sup> But even if Great Britain was right in her contention that she had neglected no neutral duty when she permitted the original departure of the *Alabama* and her sister cruisers, we must conclude that International Law had proved inadequate to deal in a satisfactory manner with a great emergency. If, on the other hand, she was wrong, we must admit that the most important maritime power in the world had been guilty of a breach of International Law without knowing it and while being informed by all her authorities that her conduct was perfectly correct. The explanation of the puzzle is that no certainty existed, or could exist, at the time in question. Both doctrine and practice were in a transition state. The older rule no longer satisfied the awakened conscience of civilized nations; but no clear and definite usage had grown up to provide a substitute for it.

<sup>1</sup> *Letters of Historicus*, VI., VII.

<sup>2</sup> e.g. Calvo, *Droit International*, § 2326; Bluntschli, *Opinion Impartiale sur la Question de l'Alabama*, in the *Revue de Droit International*, Vol. II., pp. 452-485.



## § 262.

Two principles have been put forward as the basis of a new rule. The first is derived from the long series of American decisions in the cases under the Foreign Enlistment Act of 1818, to which reference was made in the preceding section. The second is due to the insight of a distinguished English publicist. We will take them in order.

Two attempts to solve the difficulty with regard to the fitting out of vessels in neutral ports.

The great judges who adorned the Supreme Court of the United States during the first quarter of the nineteenth century laid down again and again that the intent of the parties concerned in the fitting out, arming and equipping in question should be the determining element in the decision—the *animus vendendi* being innocent, the *animus belligerendi* guilty. In illustration of this doctrine it will be sufficient to cite two cases out of the multitude available. On March 12, 1822, Judge Story in delivering the judgment of the Supreme Court in the case of the *Santissima Trinidad*<sup>1</sup> took occasion to say: “There is nothing in our laws, or in the law of nations, that forbids our citizens from sending armed vessels, as well as munitions of war, to foreign ports for sale. It is a commercial adventure, which no nation is bound to prohibit, and which only exposes the persons engaged in it to the penalty of confiscation.” The next day in the case of the *Gran Para*<sup>2</sup> Chief Justice Marshall decreed restitution of captured property brought within the jurisdiction of the United States, on the ground that the owner of the capturing vessel, which had been built and equipped in Baltimore, “fitted her out with intent that she should be employed in the service” of a nation at war with a power with which the United States was at peace. Dana sums up the doctrine of these and numerous other cases in the words: “As to the preparing of vessels within our jurisdiction for subsequent

<sup>1</sup> Wheaton, *Reports of the Supreme Court*, VII., 283.

<sup>2</sup> *Ibid.*, VII., 471.

hostile operations, the test we have applied has not been the extent and character of the preparations, but the intent with which the particular acts are done. . . . Is the intent one to prepare an article of contraband merchandise, to be sent to the market of a belligerent subject to the chances of capture and of the market? Or, on the other hand, is it to fit out a vessel which shall leave our port to cruise immediately or ultimately, against the commerce of a friendly nation? The latter we are bound to prevent. The former the belligerent must prevent.”<sup>1</sup>

It is a grave question whether the principle that “the intent is all” furnishes a workable rule in the complicated cases that frequently arise during the progress of a war. Nothing is more difficult to prove than intentions. They have frequently to be inferred from actions of an ambiguous character. Moreover, the two intents—that of selling and that of making war—may coexist in the same mind. Dana himself must have had some misgivings about the rule he champions so ably; for he admits that “the line may often be scarcely traceable,” though he hastens to add that “the principle is clear enough.”<sup>2</sup> But surely a line that is often scarcely traceable is not a very advantageous boundary between the permitted and the forbidden, and a principle that requires subtle psychological distinctions for its due application is fitter for the lecture-room of a Professor of Mental Philosophy than the Bench of a Court of Law. To what refinements it may lead in practice the case of the *United States v. Quincy*<sup>3</sup> shows. The Court distinguished carefully between a fixed and present intent and a contingent or conditional intent, and ruled that an intent to go to the West Indies and endeavor to procure funds for a belligerent cruise was a contingent intent, and therefore innocent, whereas an intent to go on a belligerent cruise that was liable to be defeated by failure to obtain the necessary funds

<sup>1</sup> Note 215 to Wheaton's *International Law*, pp. 562, 563.

<sup>2</sup> *Ibid.*, p. 563.

<sup>3</sup> Peters, *Reports of the Supreme Court*, VI., 445.

in the West Indies was a fixed and present intent, and therefore guilty.

The objections to the doctrine which makes everything turn upon intent are well put by Mr. W. E. Hall. After enforcing them with his usual learning and ability, he suggests as an alternative principle that the character of the ship should be the test. He would lay upon the neutral the duty of preventing the departure from its ports of "vessels built primarily for warlike use," if they were destined for the service of either belligerent; while he would leave unmolested "vessels primarily fitted for commerce."<sup>1</sup> Experts can tell almost from the laying of the keel the difference between the two classes of ships. No doubt some commercial vessels can be adapted for war with greater or less ease; but belligerents would do well to submit to the free sale and issue of such ships in consideration of the total prohibition of the construction of war-vessels for their opponents. In the same way neutrals would find it advantageous to purchase freedom of commercial ship-building and entire immunity from belligerent reproaches by the sacrifice during hostilities of their trade with the contending powers in ships of war. The suggested rule is free from all the perplexities connected with decision by intent, and would involve less interference with neutral ship-building than the British Foreign Enlistment Act of 1870, which is administered with vigor and success in the present conflict between China and Japan.

### § 263.

The question is still far from settlement. The old principles have been thoroughly discredited and the maritime powers have come to no agreement upon new ones. The three rules of the Treaty of Wash-  
The three rules of the Treaty of Washington and the award of the Geneva Tribunal.  
 ington of 1871, and the award given by the Geneva Tribunal in the following year, ought to have cleared

<sup>1</sup> Hall, *International Law*, § 225 and notes.

up the difficulty, but unfortunately they did nothing of the kind. The limits of neutral liability for the escape of belligerent vessels are not more clearly defined than they were before; and on this and other points the decision of the arbitrators, though it settled the case before them, has not met with general acceptance as containing desirable regulations for the future conduct of belligerents and neutrals in their mutual relations.

By the sixth article of the Treaty of Washington,<sup>1</sup> the arbitrators appointed to settle the chief questions at issue between Great Britain and the United States were to be governed in their decision by three rules set forth in the article and the principles of International Law not inconsistent therewith. Great Britain consented to be judged by the rules in question, though she held that they were not part of the law of nations at the time when the events complained of took place; and both parties agreed to observe the rules as between themselves in future and to invite other maritime powers to accede to them. The three rules were as follows:—

“A neutral government is bound:—

“First. To use due diligence to prevent the fitting out, arming, or equipping, within its jurisdiction, of any vessel which it has reasonable ground to believe is intended to cruise or to carry on war against a power with which it is at peace; and also to use like diligence to prevent the departure from its jurisdiction of any vessel intended to cruise or carry on war as above, such vessel having been specially adapted, in whole or in part, within such jurisdiction, to warlike use.

“Secondly. Not to permit or suffer either belligerent to make use of its ports or waters as the base of naval operations against the other, or for the purpose of the renewal or augmentation of military supplies or arms, or the recruitment of men.

<sup>1</sup> *Treaties of the United States*, 481.

"Thirdly. To exercise due diligence in its own ports and waters and as to all persons within its jurisdiction, to prevent any violation of the foregoing obligations and duties."

No sooner had the treaty which contained these rules been signed than disputes arose as to the meaning of some of the expressions and clauses in them. The difficult question of "due diligence" gave rise to long discussions and cannot be said to have been satisfactorily settled at last. We have already reproduced the various interpretations placed upon the phrase;<sup>1</sup> and we have also endeavored to indicate the characteristic features of a "base of naval operations,"<sup>2</sup> as to which British and American ideas differed considerably. But perhaps the most hotly disputed point is concerned with the latter portion of the first rule, which binds the neutral to use due diligence to "prevent the departure from its jurisdiction of any vessel intended to cruise or carry on war as above, such vessel having been specially adapted, in whole or in part, within such jurisdiction, to warlike use." Three different interpretations were placed upon the words in question. Great Britain contended that they referred only to the original departure of the peccant vessel with her sins fresh upon her, and could not be intended to impose upon the government of the injured neutral the obligation of seizing her if she afterwards visited any of its ports as a duly commissioned ship of war. Such a course, it was argued, would be in itself a violation of International Law, which conferred upon all lawful belligerent cruisers immunity from local jurisdiction when visiting the ports of states with which their own country was at peace.<sup>3</sup> The United States admitted that a commission emanating from a recognized power protected the vessel bearing it from all subsequent proceedings against her by a neutral whose neutrality she

<sup>1</sup> See § 250.

<sup>2</sup> See § 250.

<sup>3</sup> See *British Case*, Pt. III.; the *Argument of Sir R. Palmer before the Geneva Tribunal*; and *Reasons of Sir A. Cockburn for Dissenting from the Award*, 148-156

had violated; but they declared that this immunity did not apply to vessels of a warring community, recognized as a belligerent, but without recognition as a sovereign state. Such ships might be exempt from judicial process and the jurisdiction of neutral courts, but not from the control of the neutral executive, which was bound to seize them whenever they entered its ports, if they had been illegally fitted out, armed or equipped within its jurisdiction, or had received therein any addition to their effective power of doing injury to their foes.<sup>1</sup> The Arbitral Tribunal went further than the advocates of the United States, and accepted their interpretation without the limitations they had placed upon it. The Award laid down that the effects of a violation of neutrality are not done away with by any commission which the guilty vessel may acquire from a belligerent government, and laid upon the injured neutral the duty of seizing such vessels on any subsequent visit to her ports, even though they belonged to recognized and old-established sovereign states.<sup>2</sup>

There can be no doubt that as a general rule the commission of a belligerent power exempts the ship which bears it from proceedings against her in the ports of other states. The decision of Chief Justice Marshall in the case of the *Exchange* is decisive on this point. On proof that the vessel had been duly commissioned by Napoleon I., he declined to try in an American court the legality of her original seizure by the French Government when she was owned by an American citizen and lay in a Spanish port.<sup>3</sup> But the question whether this rule applies to vessels who have no recognized government behind them to be responsible for their misdeeds, and applies so far as to shield them from executive action on the part of the state whose neutrality they have

<sup>1</sup> See *American Case*, Pt. III.; and the *Argument of Mr. Foarts before the Geneva Tribunal*.

<sup>2</sup> See *Award of the Geneva Tribunal*, Recitals 4, 5, 6, 10, 14.

<sup>3</sup> Cranch, *Reports of U. S. Supreme Court*, VII., 116.

violated, was a new one when raised by the advocates of the United States in the Geneva Arbitration. Circumstances exactly like those of the *Alabama* and her sister cruisers had not arisen before. Both sides quoted decisions in analogous cases, and each was quick to point out that its opponent's analogies broke down in some important particular. The wide ruling of the Arbitral Tribunal seems to have been dictated more by a regard for equitable considerations than by reference to principles hitherto accepted among nations. Its adoption would add enormously to the burdens of neutrality, and would probably bring about serious conflicts between neutral states and belligerents whose vessels were seized. On the other hand, the practical immunity enjoyed under the British interpretation of the law by belligerent communities whose independence has not been recognized is obviously unfair. Other states cannot deal officially with their governments and hold them responsible for offences committed by their cruisers; and if the cruisers themselves cannot be touched when once they have completed their offence and become fully commissioned war-ships, absolute immunity is secured to them and their principals, and no remedy exists for a grave international wrong. If it is too much to say that the rule suggested by the United States is law, we may venture upon the assertion that it might be made law with great advantage.

The grave disagreements we have sketched, and others of minor importance to which we have not alluded, did not improve the chance of a general acceptance of the Three Rules of the Treaty of Washington. The two powers most immediately concerned have never been able to settle the terms of a joint note inviting others to accede to them, and since 1876 have given up the attempt to do so. The governments of Germany and Austria let it be known beforehand that their consent would be withheld; and no state has shown itself eager to adopt the new *formulæ*.<sup>1</sup> It was almost

<sup>1</sup> Wharton, *International Law of the United States*, § 402 a.

impossible to separate the rules from the interpretation put upon them by the Arbitrators; and statesmen felt that, though the former might be understood in an acceptable sense, the latter imposed upon neutrals impossible obligations, and would have made neutrality almost as burdensome as war. The *Institut de Droit International* discussed the question at its sessions in 1874 and 1875, and adopted at the Hague in the latter year a series of conclusions which embodied the principles of the rules but considerably altered their phraseology.<sup>1</sup> So flat have they fallen that it has been doubted whether they bind the two powers which originally contracted to observe them.<sup>2</sup> Instead of settling disputed points they have raised new difficulties. The utmost that can be said for them is that they, and the events of which they formed a part, have roused neutral governments to greater watchfulness and activity, in order to prevent violations of neutrality for which they will assuredly be held responsible by the injured belligerent.

### § 264.

We may now conclude our attempt to set forth the duties of neutral states towards belligerent states; but before we leave the subject it will be useful to indicate very briefly what are the powers possessed by neutral governments for the protection of their neutrality. They have first the remedy by diplomatic complaint. As a rule their remonstrances are sure of a respectful hearing; for it is to the interest of every belligerent to keep on good terms with the powers that take no part in the war. If the case is flagrant and the wrong notorious and undoubted, adequate reparation will generally be accorded in answer to reasonable demands. Another remedy which by no means excludes the former, though

The powers possessed by neutral governments for the protection and vindication of their neutrality.

<sup>1</sup> *Tableau Général de l'Institut de Droit International*, pp. 161-163.

<sup>2</sup> Wharton, *Commentaries on American Law*, § 244.



quite independent of it, is to be found in administrative action, treading close on the heels of the wrong, and either preventing its completion or inflicting exemplary punishment on the wrong-doer. Thus, if a belligerent war-vessel tries to effect a capture in a neutral port, the authorities may use whatever force is at their disposal for the purpose of frustrating the attempt. And if the aggressor is crippled or sunk in the course of the struggle, her commander has only himself to thank for the result of his attempt at outrage. Some writers extend the power of the neutral state beyond the limits of its jurisdiction, and allow it to pursue an offending vessel on to the high seas and there deal with it as justice may demand.<sup>1</sup> But no clear authority for this statement can be found in usage or in judicial decisions, and in principle it is altogether wrong. A state has a right to police its own waters ; but it has no sort of right to enforce outside them the regulations it deems necessary for protecting the integrity of its territory. If a vessel which has in any way violated its neutrality manages to escape, it can claim through diplomatic channels redress for the past and respect for the future. But we submit that any attempt to do on the open ocean, where there is no territorial jurisdiction, acts which are inseparable from such jurisdiction, is in itself an offence against the law of nations which it professes to vindicate. The point might have received an authoritative decision had the United States cruiser *Charleston* caught the Chilian transport *Etata*, when in May, 1891, the latter escaped from the port of San Diego after violating American neutrality by taking on board therein a cargo of arms. But the pursuit was unsuccessful, and the question of right remains where it was before. It will be solved in a sense favorable to the claim to pursue, if the rules on the subject of territorial waters recently accepted by the *Institut de Droit International* should ever receive the sanction of the maritime

<sup>1</sup> e.g. Bluntschli, *Droit International Codifié*, § 342 ; Hall, *International Law*, § 227 ; Woolsey, *International Law*, § 58.

powers. The eighth of the Articles adopted at Paris in March, 1894, declared that, in case of an offence committed within the jurisdiction of the territorial power, it might continue on the high seas a pursuit commenced in its waters; but the right to follow and capture was to cease if the flying vessel gained a port of its own country or of a third power.<sup>1</sup>

We come lastly to the remedy by judicial process. The neutral state has the right of exercising jurisdiction through its Prize Courts over captures made by belligerents within its dominions, whether the captured property remains from the first in the neutral waters where it has been illegally taken, or is brought back to them some time after the capture. The restoration may be made by administrative act, but it is generally more convenient that the case should go before the neutral courts and be decided by them. Their jurisdiction extends also to cases where the capturing vessel has received either its original equipment for war or a subsequent augmentation of warlike force within the neutral's territorial waters, and has afterwards taken a prize and brought it into one of the ports of the injured power. This is clearly set forth in a large number of judicial decisions, the most important of which is that given by Judge Story in the case of *Santissima Trinidad*,<sup>2</sup> when he laid down, among other propositions, that the neutral's jurisdiction was limited to captures made during the cruise wherein the illegal outfit or augmentation of force took place. This, and many other questions connected with such cases, are rendered less important now than formerly owing to the tendency of neutral states in modern times to exclude belligerent prizes from their ports.

<sup>1</sup> *Annuaire de l'Institut de Droit International*, 1894-1895, p. 330.

<sup>2</sup> Wheaton, *Reports of the U. S. Supreme Court*, VII., 283.

## CHAPTER IV.

### ORDINARY NEUTRAL COMMERCE.

#### § 265.

WE have now to consider the Law of Neutrality in its second great division, which deals with belligerent states and neutral individuals.<sup>1</sup> In the Middle Ages the growth of trade forced commercial questions upon the attention of rulers long before the idea arose that states as corporate bodies had any duties towards one another in the matter of neutrality. The belligerent dealt with neutral commerce himself, and punished in his own courts violations of the rules he laid down for the furtherance of his own interests. Then, as trade became more important and traders more influential, they began to demand that some respect should be paid to them ; and after the decay of feudalism and the commencement of a new commercial and industrial epoch, states arose whose policy it was to extend the immunities of neutral merchants at the expense of belligerent rights. For three centuries at least trading interests have grown steadily stronger and stronger ; and the result has been a continual modification of the older rules, and the growth of a body of law, which is a compromise between the attempt of the belligerent state to cut off its enemy's trade and the attempt of the neutral individual to trade unhindered by the war. Opposing self-interests have been the main forces at work in the development of indi-

The conflict between belligerent and neutral interests in the matter of trade.

<sup>1</sup> See § 248.

vidual neutrality, just as ethical principles have been the chief elements in the growth of state neutrality. But nevertheless the rules which govern the ventures of neutral merchants and ship-owners possess a clearness and symmetry which are lacking when we turn to the mutual duties of neutral and belligerent states. The difference is due to the fact that the former have been administered by Prize Courts and reduced to system by trained jurists, whereas the latter are in the main left to be settled by the *ex parte* arguments of international controversies and the slow growth of opinion among civilized peoples.

Among the subjects which fall under the head of neutrality as it is concerned with the rights and obligations of belligerent states and neutral individuals, the first place must be given to what we have already called Ordinary Neutral Commerce.<sup>1</sup> By these words we mean commerce uncomplicated by any question as to the kind of service performed by the ship concerned, or the warlike character of the goods conveyed, or the special circumstances of their port of destination. Under this head, therefore, we have to deal with the restrictions belligerents have endeavored to place upon harmless every-day trade, on the plea that they must be allowed to put all possible stress upon a foe, even at the expense of neutral interests, and the modifications contended for by neutrals on the principle that they must be permitted to carry on their commerce unhindered by a war in which they are not concerned. The special character of sea-borne commerce often renders it impossible to separate neutral and belligerent interests in it, and strike at an enemy without injuring a friend. On land neutral goods in belligerent territory are subject to the ordinary rules of warfare. Their situation within the enemy's dominions is held to impress an enemy character upon them. But at sea, where there is no territorial jurisdiction to simplify matters, enemies' goods are often found on neutral ships, and neutral goods on enemies'.

<sup>1</sup> See § 248.

ships. It is necessary, therefore, to settle in each case whether the element of neutrality or the element of belligerency shall prevail. Two principles have found favor at various times as rough attempts to provide a workable compromise between the demands of warring navies and the claims of neutral commerce. The first lays down that the liability of the goods to capture shall be determined by the character of the owner, while the second declares that the character of the vehicle shall decide. These two principles, taken either separately or in combination, will be found to lie at the bottom of all the practical rules that have ever been enforced, since International Law became strong enough to impose rules of any kind upon indiscriminate robbery.

### § 266.

The Consolato del Mare, which was the greatest of the mediæval maritime codes,<sup>1</sup> declared that if the captured vessel was neutral and the cargo enemy the captor might compel the vessel to carry the cargo to a place of safety, paying her the freight she was to have received from the owners of the goods. If, on the other hand, the vessel was enemy and the cargo neutral, the owners of the cargo were at liberty to ransom the vessel from the captor and proceed on their voyage ; and if they refused to do so, the captor might send the vessel to a port of his own country and make the owners of the cargo pay the freight they would have paid to the original belligerent owner of the vessel. But if they were willing to make satisfactory arrangements about the ship and the captor refused, they could claim from him compensation for damage and he could claim no freight from them.<sup>2</sup> Upon these provisions the whole fabric of the law of capture at sea was reared. It proceeded upon the principle that the fate of the goods depended upon the quality of the owner. If he were

The history of the rules of ordinary maritime capture.

<sup>1</sup> See § 29.

<sup>2</sup> Pardessus, *Us et Coutumes de la Mer*, II., 304.

an enemy, they were subject to capture, even though they might be found in a neutral vehicle ; if he were a neutral, they were free from capture, even though they might be found in an enemy vehicle. There can be no doubt that the rules of the Consolato were generally adopted in the Europe of the Reformation and the Renaissance, though abnormal usages sometimes showed themselves. It was, for instance, made matter of serious discussion by belligerents whether neutrals should be allowed to trade at all with the enemy, and the doctrine that the neutral ship was tainted by the enemy cargo, and therefore subject to capture along with the hostile goods it carried, was occasionally put into practice. But on the whole states followed the plain and simple plan of capturing enemy goods and letting neutral goods go free, regardless of the nationality of the vessel in which they were found. And further, as civilization and trade advanced the obligation of bringing captured vessels in for adjudication by competent Prize Courts was universally admitted ; and it was held that the courts must both condemn the enemy goods while they released the neutral vehicle and paid freight to its owners, and also condemn the enemy vehicle while they released the neutral goods. This did away with that portion of the code of maritime capture contained in the Consolato which deals with the ransom of a belligerent prize by the neutral owners of her innocent cargo ; but in other respects the code remained intact and became part of the common law of nations. Grotius speaks with approval of it and cites numerous instances of its application.<sup>1</sup> He also argues against the seizure of neutral goods found in enemies' ships, on the ground that their situation ought not to be held to condemn them, but at most to indicate a presumption of hostile character which might be rebutted by proof that they were really neutral.<sup>2</sup> Bynkershoek gives utterance to the same opinions in a more pronounced manner,<sup>3</sup> and Vattel is

<sup>1</sup> *De Jure Belli ac Pacis*, III., I., V., note.

<sup>2</sup> *Ibid.*, III., VI., VI.

<sup>3</sup> *Quæstiones Juris Publici*, I., 13, 14.

equally emphatic.<sup>1</sup> It would be easy to lengthen the chain of authorities, were it necessary to do so. In fact all the great publicists who touch upon the question up to the middle of the eighteenth century agree with those we have cited ; and their modern successors who attempt to prove that the practice of capturing enemy goods under a neutral flag was a usurpation and an outrage are obliged to base their reasoning upon a *loi primitive*, which resides chiefly in their own breasts, and a number of selected treaties, which stipulate for the observance of rules other than those in general use between nations.<sup>2</sup> But the controversies here glanced at are really ancient history. Since the acceptance of the Declaration of Paris in 1856 they have had no bearing upon practical affairs. That great international instrument closed a chapter in the history of maritime law ; and all we need do is to glance at the record in order that we may be able to understand our present position. We have shown how the rules of the Consolato del Mare became the law of capture at sea in time of war. It now remains for us to give a rapid sketch of the system which first rivalled and then partially supplanted them ; and when this has been done we shall be in position to understand the maritime jurisprudence of the modern world.

In order to gain general acceptance, the Consolato had, as we have seen, to struggle against harsher rules ; but when its position was secured, an alternative arose based upon a principle deemed to be more favorable to neutral commerce. It was suggested that the liability of goods to capture should be determined by the character of the vessel which carried them. If she were neutral, they were to go free, even though they belonged to an enemy ; but if she were enemy, they were to be condemned, even though they belonged to a neutral. The new doctrine was set forth in the twin maxims,

<sup>1</sup> *Droit des Gens*, III., §§ 115, 116.

<sup>2</sup> e.g. Ortolan, *Diplomatie de la Mer*, Liv. III., Ch. V. ; Hautefeuille, *Droit et Devoirs des Nations Neutres*, Tit. X., Ch. I., Sec. II.

*Free ships, free goods, and Enemy ships, enemy goods.* It fitted in with the extreme ideas on the subject of the immunity of the neutral flag and the extraterritoriality of the neutral vessel,<sup>1</sup> which found favor with a certain school of continental publicists. Some of them even went beyond it and declared that neutral goods on enemy ships were free, as well as enemy goods on neutral ships.<sup>2</sup> But the Dutch, its first advocates, adopted it on grounds of self-interest and commercial utility. They recognized to the full that it was a new principle, which must be applied by special agreement if their commerce was to gain the benefit of it. The greater part of the carrying trade of Europe was in their hands during the seventeenth century, and the object they had in view was to obtain freedom from molestation for belligerent commerce entrusted to their care. But, in order to gain what they desired, they were obliged to purchase safety for enemy merchandise beneath a neutral flag by conceding to belligerents a right to capture neutral goods beneath an enemy flag. Thus we find a long series of treaties stipulating for the adoption of the principle that the character of the vehicle settles the fate of the goods, unless indeed contraband of war be found on board a friendly vessel, in which case it is not protected by the neutral flag. The first was made between the United Provinces and Spain in 1650,<sup>3</sup> and it was followed at irregular intervals by many others.<sup>4</sup> The United States from the commencement of their separate national existence showed their willingness to embody the newer doctrine in their formal international agreements. It occurs in the treaties of 1778 and 1800 with France, in the treaty of 1782 with the Dutch and in the treaty of 1783 with Sweden.<sup>5</sup> The treaties of 1785 with Prussia and 1795 with Spain go still further and stipulate for the rule *Free ships, free goods*

<sup>1</sup> See § 120.

<sup>2</sup> Cf. Hübner, *De la Saisie des Bâtiments Neutres*; G. F. de Martens, *Precis*, Liv. VIII., Ch. VII., § 316.

<sup>3</sup> Dumont, *Corps Diplomatique*, Vol. VI., Pt. I., p. 571.

<sup>4</sup> Manning, *Law of Nations* (Amos's ed.), Bk. V., Ch. VI.

<sup>5</sup> *Treaties of the United States*, pp. 301, 303, 326, 752, 753, 1044, 1046.



without the corresponding rule *Enemy ships, enemy goods*; but in 1799, when a new treaty was negotiated with the former power, the previous agreement was replaced by a promise to observe "the principles and rules of the law of nations generally acknowledged," and in 1819 the obligation entered into with Spain was confined to cases where reciprocity was observed by neutral powers the goods of whose subjects were spared.<sup>1</sup> A complete return to the original rule is found in the treaty with Great Britain of 1794, which expressly stated that the property of an enemy found on board a neutral vessel should be regarded as good prize of war.<sup>2</sup> It is evident from these examples that the diplomatic policy of the United States has not been consistent. On the whole it has inclined strongly towards the freedom of enemy goods under the neutral flag; but in recent times the treaties have contained a proviso that the contracting parties will give the benefit of this rule only to those neutrals who govern their own practice by it when they are at war.<sup>3</sup> Yet American jurists have always laid down that in the absence of treaty stipulations the old rule applies. Kent says of the agreements that free ships should make free goods, that such provisions "are to be considered as resting on conventional law merely and as exceptions to the operation of the general rule;"<sup>4</sup> and Jefferson wrote in 1793, "I believe it cannot be doubted that by the general law of nations the goods of a friend found in the vessel of an enemy are free, and the goods of an enemy found in the vessel of a friend are lawful prize."<sup>5</sup> The decisions of the Supreme Court were to the same effect. The attitude of the United States, therefore, has been that of a power which admitted the obligation of the old rules where they were not overridden by special agreement, but

<sup>1</sup> *Treaties of the United States*, pp. 802, 911, 1010, 1011, 1020, 1021.

<sup>2</sup> *Ibid.*, p. 389.

<sup>3</sup> e.g. The Treaty of 1887 with Peru, *Treaties of the United States*, p. 1196.

<sup>4</sup> *Commentaries* (Abdy's ed.), Ch. VIII., p. 342.

<sup>5</sup> Wharton, *International Law of the United States*, § 342.

desired to see them superseded by the more modern doctrine. Great Britain, on the other hand, not only maintained the ancient law of maritime capture, but held it to be in itself just and satisfactory. She made very few treaties setting it aside in favor of the principle that the flag covers the cargo, and took the first opportunity of getting rid of any engagement of the kind into which circumstances had compelled her to enter. Her insistence upon the system of the Consolato del Mare brought upon her a great deal of odium, especially from the statesmen and publicists of the continent of Europe. Her writers retorted with vigor and effect ; but the controversy lost its practical importance when in 1856 the British Government signed the Declaration of Paris, and accepted thereby the rule *Free ships, free goods* without the corollary *Enemy ships, enemy goods*.

Hitherto we have placed the principle of the character of the vehicle in sharp opposition to the principle of the ownership of the goods, as a means of determining their liability to capture. But it is quite possible to combine the two, and take as a guide to practice that part of each which is most unfavorable to neutrals or that part which is most favorable to them. If we follow the principle of ownership when it bears hardly on neutral trade, we arrive at the rule that the goods of an enemy on board the ship of a friend are good prize ; and, if we do the same with the principle of the nationality of the vessel, we obtain the rule that the goods of a friend on board the ship of an enemy are good prize. Combining the two we reach the severe conclusion that *Enemies' goods in neutral ships and neutral goods in enemies' ships are liable to capture*. On the other hand, if we take that portion of the operation of each of our two principles which is most favorable to neutral trade, they work out into the rule that *Neutral goods in enemies' ships and enemies' goods in neutral ships are not liable to capture*. We see then that neutrals may be subjected to a combination of the more severe or the more lenient portions of each of the two main doctrines as to mari-

time capture. The harsher practice was followed by France in the sixteenth and seventeenth centuries, though sometimes she seems to have fallen back upon the rules of the Consolato, and in the latter part of the period she bound herself by several treaties to adopt towards the co-signatory powers the principle of the freedom of hostile property under the neutral flag. But when Louis XIV. was at the height of his power he made the usual French practice harsher still by the famous Marine Ordinance of 1681, which is called by Azuni "*le chef-d'œuvre de la législation établie par cet incomparable monarque.*"<sup>1</sup> It not only condemned neutral goods carried in enemies' ships, but also declared that neutral ships were liable to condemnation for carrying enemies' goods. The doctrine that enemy property infected with its hostile character whatever neutral property it was brought into contact with was followed by France till 1744, and by Spain from 1704 till the former date, when a French Ordinance gave freedom from capture to neutral vessels laden with enemies' goods and the Spanish Government changed its naval policy in accord with its powerful ally. The varying needs and circumstances of the great maritime struggle with England caused the French rules of capture at sea to vary with bewildering rapidity in the latter half of the eighteenth century and the first years of the nineteenth. The termination of the conflict left France with her traditional policy of capturing neutral goods in enemies' ships, without the added severity of the condemnation of neutral vessels for carrying enemies' goods, while England still adhered to the old practice of making prize of enemies' goods under a neutral flag. Thus when in 1854 England and France were allied against Russia there seemed no escape for neutral trade. But the two powers felt that it was neither desirable nor possible to revive the severities of a bygone age, and agreed that during the war they would not capture enemies' goods in neutral vessels or neutral goods in enemies' vessels.

<sup>1</sup> *Droit Maritime de l'Europe*, Vol. I., Ch. III., Art. XIV.

This brings us to a combination of the more favorable aspects of the two great doctrines on the subject of maritime capture. An attempt was made in 1752, by the Prussian commissioners who reported to Frederick the Great on what is known as the Silesian Loan Controversy,<sup>1</sup> to show that the capture of enemies' goods on neutral vessels was contrary to the law of nations.<sup>2</sup> But their arguments were extremely weak, and it was admitted on all sides that the British reply shattered their case to pieces.<sup>3</sup> The Armed Neutralities of 1780 and 1800 endeavored to establish the rule of *Free ships, free goods* without the logical accompaniment of *Enemy ships, enemy goods*.<sup>4</sup> The principles of the first Armed Neutrality had been accepted by all the chief continental powers when the peace of 1783 put an end for a time to the application of any rules of warfare at sea. But hardly had the French Revolution initiated the next great cycle of European wars, when Europe made haste to abandon the maritime code to which its states had pledged themselves a few years before. Again, however, the naval preponderance of Great Britain, and the severity with which she used it in the matter of colonial trade, raised a feeling of jealous hostility against her. Neutral states found that their commerce did not prosper as fully as they had hoped; and in 1800 Russia headed a movement which had for its object to cripple the principal maritime belligerent by reviving the Armed Neutrality of twenty years before. The Baltic powers joined the league; but within a few months it was broken up owing to the death of the Emperor Paul and the vigorous action of the British Government.<sup>5</sup> Then followed a period of confusion. Every European power was drawn into the conflict at one time or another, and some were at war with scarcely any intermission till the general peace of 1815. The signatories

<sup>1</sup> See § 198.

<sup>2</sup> C. de Martens, *Causes Célèbres*, II., cause première.

<sup>3</sup> Manning, *Law of Nations* (Amos's ed.), Bk. V., Ch. VI., § 2.

<sup>4</sup> C. de Martens, *Recueil*, I., 193, 194 and II., 215-219.

<sup>5</sup> Wheaton, *History of the Law of Nations*, Pt. III., §§ 14-20.

of the Armed Neutrality trampled as belligerents upon the doctrines they had championed as neutrals; while Great Britain and France vied with one another in attacks upon innocent commerce, each justifying its severities on the plea that they were adopted in retaliation for illegal acts committed by the other.<sup>1</sup> At the end of the struggle no definite code of maritime capture had received universal acceptance. It was left for peaceful agreement to bring about in another generation what force had failed to effect in the great world-conflict which centred round Revolutionary and Napoleonic France.

### § 267.

We have just seen how the states who were allied against Russia in the Crimean War pledged themselves at its commencement to act throughout it on the principle that they would capture neither the goods The Declaration of Paris. of an enemy in the vessel of a friend nor the goods of a friend in the vessel of an enemy, reserving, however, for the operation of the ordinary law cases of carrying contraband or attempting to run blockade. At the close of the war the powers assembled in conference at Paris agreed upon a Declaration concerning Maritime Law, which must not be confounded with the Treaty of Paris though it was drawn up and signed by the same plenipotentiaries. It was adopted on April 16, 1856, and its enactments are contained in the four following articles:—

1. Privateering is and remains abolished.
2. The neutral flag covers enemy's goods with the exception of contraband of war.
3. Neutral goods, with the exception of contraband of war, are not liable to capture under the enemy's flag.
4. Blockades in order to be binding must be effective,

<sup>1</sup> Manning, *Law of Nations* (Amos's ed.), Bk. V., Chs. VI., X., XI.

that is to say, maintained by a force sufficient really to prevent access to the coast of the enemy.<sup>1</sup>

Great Britain, France, Austria, Prussia, Russia, Sardinia and Turkey were the original signatory powers. They bound themselves "to bring the present Declaration to the knowledge of the states which have not taken part in the Congress of Paris, and to invite them to accede to it." The invitation has been favorably received by nearly all the members of the family of nations; but a little group, the most important of which are the United States, Spain, Mexico, Venezuela and China, have declined it. The situation created by their refusal has been already discussed.<sup>2</sup> All we need say here is that every war which passes without an infringement of the Declaration gives it greater authority. Since 1856 civilized belligerents have never resorted to the practices it was meant to supersede. Continuous observance of its provisions must make it in time a part of the common law of nations, even if the express consent of a few states is still withheld.

The first article of the Declaration of Paris deals with a subject we have already considered,<sup>3</sup> and the fourth is concerned with a matter which will come up for consideration in the next chapter.<sup>4</sup> But the second and third articles have a most important bearing upon the question under discussion at the present moment. They give the sanction of general agreement to the principle that free ships make free goods without the usual corollary that enemy ships make enemy goods. The adhesion of Great Britain to this agreement marks the complete victory of commercial considerations over the rules of the *Consolato del Mare*. She had stood out long for the older and severer practice; but in the end she saw that her position as a great trading nation, disposed in the main to peaceful courses and therefore likely to be

<sup>1</sup> Wharton, *International Law of the United States*, § 342; *Annual Register for 1856*, p. 221.    <sup>2</sup> See § 63.    <sup>3</sup> See § 223.    <sup>4</sup> See §§ 269, 272.

neutral in subsequent wars, rendered it advisable for her to accept provisions under which her commerce would gain immensely as long as she was not a belligerent. The vast growth of her carrying trade since 1856 has justified the foresight of her statesmen, though we have seen reason to believe that her interests would be served more effectually, if she would go further and assent to the total abolition of the capture of private property at sea in time of war, with the usual exceptions against contraband, blockade-running and unneutral service.<sup>1</sup> None of the powers which refused to sign the Declaration objected to its second and third articles. Their action was caused by an unwillingness to surrender the right of employing privateers as long as private property was still liable to the depredations of hostile cruisers. Those of them who have been engaged in war since 1856 have respected enemy goods in neutral vessels as well as neutral goods in enemy vessels; and in the great conflict between North and South in the United States both parties agreed to observe all the articles of the Declaration except the first, and did in fact observe them all.

Enemy property in enemy ships is still subject to maritime capture. Its freedom from molestation under the flag of a friend is a concession made to neutrals; and in respect of it two questions have been raised. The first asks whether belligerents who have signed the Declaration of Paris are bound to give the benefit of it to neutrals who have refused their signatures. We may reply that such a privilege can hardly be claimed as a right. The last clause of the Declaration contained a proviso that "it is not and shall not be binding except between those powers who have acceded or shall accede to it." In so far, therefore, as the rules it embodies derive their validity from express consent, it is clear that those who have failed to signify their formal adhesion to them cannot demand to be treated as if it had been given. But whatever force these rules may obtain from continual observance throughout several decades belongs to them

<sup>1</sup> See §§ 216, 217.

apart from convention and applies to all states alike. Non-signatory neutrals, who have themselves when belligerents acted upon the principle that the flag covers the cargo, would have reason to feel aggrieved should a power at war make the fact that they have not acceded to the Declaration an excuse for depriving their commerce of the protection it affords. In the Franco-German war of 1870-1871 both sides applied its principles to the property of American and Spanish subjects, though neither the United States nor Spain have signed it. A similar answer must be given to the further inquiry whether, when one belligerent has signed the Declaration of Paris and the other has not, the former is bound to act upon it in dealing with neutrals whose governments have acceded to it. There is room for doubt if we confine ourselves to the mere words of the document; but when we come to examine practice we find a strong tendency in favor of the more liberal interpretation. When England and France were at war with China, a non-signatory power, in 1860, they applied the second and third articles of the Declaration to neutral trade; and Chili and Peru did the same when they were allied against Spain in 1885.<sup>1</sup> Indeed it is far more likely that the belligerent who had not acceded to the Declaration would be induced to observe its rules than that the belligerent who had acceded to them would feel free to ignore them. The present conflict in Eastern Asia affords an apt illustration. As far as it has gone at present (October, 1894) China, the non-signatory power, has made no attempt to capture Japanese goods under a neutral flag or neutral goods under a Japanese flag, while Japan, the signatory power, has shown no sign of a wish to ignore its obligations towards neutrals on the plea that they are not shared by China. The notion of a return to the old order is an idle dream. Those who entertain it have failed to grasp either the power of modern commerce or the strength of the moral ideas that tend to restrict the destructiveness of warfare.

<sup>1</sup> Twiss, *Belligerent Right on the High Seas*, p. 8.



What the pressure of neutral interests was able to obtain in 1856 it will be able to retain in future emergencies. We may adopt with confidence the view of one of the greatest of modern authorities on naval warfare, and hold that "the principle that the flag covers the cargo is forever secured."<sup>1</sup>

### § 268.

We may confidently believe that innocent commerce will in future be safe in neutral vessels; but there is much room for doubt with regard to the acceptance of another claim sometimes put forward by neutral states. They are inclined to demand that their merchant vessels shall be free from belligerent search when under the escort of a vessel of war of their own country, whose commander is willing to pledge his word that they have not rendered themselves liable to capture either by the nature of their destination or the character of any persons or goods they may be carrying. The first attempt to defeat in this way the ordinary belligerent right of search<sup>2</sup> was made by Sweden in 1653. Peace supervened in a few months, and the question slumbered in consequence. It was not seriously raised again till the latter half of the eighteenth century, when the conduct of the Dutch roused it to vigorous life. As neutrals they had claimed for their merchantmen exemption from belligerent search when under the convoy of their ships of war; and therefore as belligerents they were bound to grant to others what they had demanded for themselves. Accordingly in January, 1781, they ordered their cruisers to refrain from searching neutral ships under convoy, if the commander of the convoying vessel declared them innocent of offence.<sup>3</sup> Soon after a number of powers made mutual concessions of

The claim that neutral vessels under convoy are exempt from belligerent search.

<sup>1</sup> Mahan, *Influence of Sea Power upon History*, Ch. I., p. 84.

<sup>2</sup> See § 210.

<sup>3</sup> Manning, *Law of Nations* (Amos's ed.), Bk. V., Ch. XI.

the privilege by special treaty stipulations. The United States were among the foremost. Between 1782 and 1800 they agreed to the insertion of the provision under consideration in no less than six treaties.<sup>1</sup> They have continued the same diplomatic policy up to the present time; and the executive department of their government has embodied it in the instructions issued to their naval officers, who are ordered not to permit ships under their convoy to be searched by belligerent cruisers.<sup>2</sup> But, nevertheless, American writers and jurists have held with singular unanimity that, though belligerents may by treaty contract themselves out of their common law right of visit and search, they cannot be compelled in the absence of such agreement to take the word of a neutral officer in lieu of the evidence of their own senses.<sup>3</sup> This is the British view, and the practice of the British Government has always been based upon it. Great Britain declined to enter into any of the agreements on the subject of convoy which were so common at the end of the eighteenth century, and insisted upon the full exercise of her belligerent right. This course of conduct brought her into sharp collision with some of the neutral states. The most important of these controversies arose in 1798 when a British squadron captured in the English Channel a number of neutral Swedish merchantmen under the escort of a Swedish frigate. They were condemned next year by Lord Stowell in a great judgment delivered in the case of one of them, called the *Maria*.<sup>4</sup> He held that the right of search was "an incontestible right of the lawfully commissioned cruisers of a belligerent nation," that "the authority of the sovereign of the neutral country being interposed in any manner of mere force cannot legally vary the right" of

<sup>1</sup> *Treaties of the United States*, pp. 328, 725, 752, 903, 1046, 1091.

<sup>2</sup> Glass, *Marine International Law*, p. 168.

<sup>3</sup> e.g. Wheaton, *International Law*, §§ 525-528; Woolsey, *International Law*, § 209.

<sup>4</sup> Robinson, *Admiralty Reports*, I., 340-379.

such cruisers, and that "the penalty for the violent contravention of this right is the confiscation of the property so withheld from visitation and search." The resistance to search in this particular case was very slight. No shot was fired and no blood was shed. But there can be no doubt of the soundness of the doctrines laid down by the great English judge, whatever may be thought of the severity with which he applied them. The Danish jurist Schlegel, who attempted to argue against them, relied upon a distinction between a Positive Law of Nations and a Natural Law of Nations. He admitted that the former allowed the search and capture of neutral vessels; but asserted that the latter knew nothing of such a right, and based upon this presumed contradiction the conclusion that belligerents cannot have a greater latitude in this respect than neutrals consent to allow.<sup>1</sup> Weak as this reasoning is, it was good enough for the Armed Neutrality of 1800, which added to the four articles of its predecessor a fifth, to the effect that the declaration of an officer in command of a neutral ship of war that there was nothing contraband on board the vessels convoyed by him should suffice to prevent belligerent search.<sup>2</sup> The second league of the Baltic powers came to an end in June, 1801, when Russia signed a treaty with Great Britain, which admitted a right to search neutral vessels under convoy, but stipulated for a special mode of procedure. The papers of the convoyed vessels were first to be examined on board the convoying vessel, and only if reasons for suspicion arose were the merchantmen themselves to be searched.<sup>3</sup> The constant shifting of sides in the great continental wars soon brought this treaty to an end; and when fresh arrangements were made they were silent on the subject of convoy. The matter was not mentioned in the Declaration of Paris. Each

<sup>1</sup> *Visitation of Neutral Vessels under Convoy* (English Translation published in London, 1801), pp. 67-70.

<sup>2</sup> C. de Martens, *Recueil*, II., 216-219.

<sup>3</sup> *Ibid.*, VII., 263.

state is free to follow whatever policy seems good to it ; and there is grave danger of serious disagreement in the future. England still takes her stand upon the integrity of the right of search ; but all the great maritime powers of the European continent have instructed their naval commanders to be satisfied with the declaration of a convoying officer. Their publicists argue that International Law obliges belligerents to accept this security, and declare that any attempt on their part to pass over it and use actual inspection to verify the character of escorted merchantmen and cargoes would be an unwarrantable outrage.<sup>1</sup> The United States occupy an intermediate position. Their legal doctrine is English, their executive policy continental. Possibly a way out of the difficulty may be found by the general adoption of the rules contained in their Naval Regulations with the addition of a few provisions taken from the Anglo-Russian treaty of 1801. An American officer in command of a convoying vessel must be furnished with a list of the vessels under convoy, particulars of their ownership and nationality, and proof that any ship bound for a belligerent destination carries no contraband of war.<sup>2</sup> If he were ordered in addition to permit search when circumstances of grave suspicion revealed themselves and to send an officer to accompany the searching party, the rules he followed might well become the law of the civilized world. Belligerents ought not to be content with the word of an officer who may easily be deceived, or may be acting in good faith on views of the nature of contraband very different from their own. The substitution of the responsibility of the neutral state for the responsibility of the neutral individual, which Hautefeuille claims as the great merit of the convoying system, is in reality its great defect. It adds to the existing opportunities of quarrel between belligerents and neutrals a new and exasperating

<sup>1</sup> e.g. Ortolan, *Diplomatie de la Mer*, Liv. III., Ch. VII. ; Hautefeuille, *Droits des Nations Neutres*, Tit. XII., Ch. I., Sec. II.

<sup>2</sup> Glass, *Marine International Law*, p. 166.

one. But if it were possible to retain the individual responsibility of the neutral merchant and ship-owner, and yet avoid, except in the last resort, the annoyance and friction of a search of each separate ship, the prospects of future peace would undergo a sensible improvement.

It is generally agreed that a neutral cruiser ought on no account to offer convoy to the merchant vessels of either belligerent. Its commander may possibly be justified in taking under his escort the ships of other neutral states ; but it is difficult to see on what principles he can claim for them immunity from belligerent search. Neutral merchantmen attach themselves at their peril to a fleet convoyed by belligerent cruisers. In so doing they render themselves liable to capture by the war ships of the other side. The act of sailing under belligerent convoy is in itself a violation of neutrality, and the vessel which is guilty of it may be condemned by a Prize Court, even though her voyage would have been perfectly innocent had she pursued it alone.

## CHAPTER V.

### BLOCKADE.

#### § 269.

BLOCKADE as a warlike operation governed by special rules is wholly maritime. On land it is always an offence to attempt to pass through the lines of an army without permission; and, if they happen to surround a fortress, the operation of ordinary rules cuts off all communication between it and the outside world. At sea, however, passage is not usually interdicted; but maritime law gives to a belligerent the right to prevent access to or egress from a port of his enemy by stationing a ship or a number of ships in such a position that they can intercept vessels attempting to approach or leave the port in question. As this restriction applies to neutral vessels, the law of blockade is a very important part of the law of neutrality. It deals with a particular aspect of the conflict before remarked upon between the belligerent claim to carry on unimpeded warlike operations and the neutral claim to carry on unrestricted trade.<sup>1</sup> Each side has endeavored to forward its interests at the expense of the other. Belligerents have sometimes acted as if the mere issue of a proclamation to the effect that the enemy's ports, or some of them, were under blockade gave them the right to intercept neutral trade; and sometimes they have supported such a proclamation with a notoriously insufficient force. The attempts of neu-

<sup>1</sup> See § 265.

trials in the contrary direction are not so numerous and have not been carried so far ; but instances are not wanting in which they have sought to surround the right to blockade with impossible conditions, or even to deny its existence except as an incident of the active operations of a siege. In the early days of modern International Law it was a question whether powerful nations, when at war, would allow neutrals to trade at all with their enemies ;<sup>1</sup> and not till the latter half of the eighteenth century were the limits of their power to cut off such trade clearly defined by Prize Courts. The matter was dealt with by the Armed Neutralities of 1780 and 1800. The first insisted very properly that no port should be considered blockaded unless there was evident danger in entering from the proximity of a belligerent squadron, but added the inadmissible proviso that the blockading vessels must be stationary. The second repeated the words of its predecessor, and placed at the end of them the further restriction that no lawful capture could be made, unless notice had been given to the peccant vessel by the commander of the blockading squadron and she had afterwards attempted to enter.<sup>2</sup> These provisions were a mixture of good law and bad. They favored neutral interests unduly ; but in the stress and turmoil of the wars with Imperial France the pendulum swung much too far towards the other side. The British Orders in Council of 1806 and 1807, and the Berlin and Milan Decrees of Napoleon, extended the severities of blockade in the most unwarrantable manner. Great Britain placed in the position of blockaded ports all places which excluded her commercial flag, and France declared the British Isles to be in a state of blockade at a time when she dared not send a single squadron out to sea for fear of capture by the victorious British navy.<sup>3</sup> The United States, as the chief neutral power, suffered very severely, and made loud and

<sup>1</sup> See § 286.

<sup>2</sup> C. de Martens, *Recueil*, I., 193, 194 and II., 215-219.

<sup>3</sup> Manning, *Law of Nations* (Amos's ed.) Bk. V., Ch. VI.

justifiable complaints. The violence of the belligerents was by no means confined to the matter of blockade. It extended over the whole range of neutral commerce and produced the irritation which led to the War of 1812 between Great Britain and the American republic.<sup>1</sup> The peace of 1815 gave an opportunity for passions to cool and reason to resume its sway over men's minds. The process of reflection removed difficulties, and in 1856 the fourth article of the Declaration of Paris gave the sanction of express consent to the generally accepted proposition that "blockades to be binding must be effective."<sup>2</sup> The words which follow require an impossibility if they are taken in the strictest literal sense. They define an effective blockade as one "maintained by a force sufficient really to prevent access to the coast of the enemy"; and a small boat might frequently pass through the most numerous and efficient squadron. It is, however, clear from the explanations given by the ministers of the various countries which signed the Declaration that nothing further was intended than the assertion of the principle that there must be a real danger in any attempt to pass through.<sup>3</sup>

This just and reasonable rule has been observed in all the blockades of the last eighty years. Neutrals have been satisfied with it and have recognized the validity of operations which conformed to its requirements. But in recent times a school of publicists has put forth a theory that blockade is the displacement by a belligerent of the territorial jurisdiction of his blockaded enemy, and therefore cannot be carried on beyond the limits of territorial waters.<sup>4</sup> The slightest reference to history is sufficient to disprove this view. Blockades are constantly maintained by vessels cruiz-

<sup>1</sup> Wharton, *International Law of the United States*, § 228.

<sup>2</sup> See § 267.

<sup>3</sup> Wheaton, *International Law* (Dana's ed.), note 233.

<sup>4</sup> Ortolan, *Diplomatie de la Mer*, II., Ch. IX.; Hautefeuille, *Droits des Nations Neutres*, Tit. IX., Ch. I., Sec. I.; Calvo, *Droit International*, § 2567.



ing outside the three-mile limit. They are warlike operations, and can therefore take place wherever it is lawful to engage in war. No one doubts that a great naval battle may be fought on the high seas; and it seems absurd to argue that the bloodless operations of a blockading squadron are interdicted in places where destruction and slaughter on a large scale can be freely indulged in to the imminent danger of any neutral vessels whose captains are foolish enough to approach the scene of conflict. The theory we are considering seems to have been invented to justify a number of restrictions upon the right of blockade which are put forth as law by the writers in question, but have no foundation in the practice of states. We are often told, for instance, that the blockading vessels must be stationary, sometimes that they must be anchored, and even that the approaching ship must be under a cross-fire from at least two of them. These statements are among the curiosities of the literature of International Law, but they have no connection with the hard facts of international relations. The *Institut de Droit International* has not embodied them in its maritime code;<sup>1</sup> and it may be safely said that the accepted conditions of effective blockade do not go beyond the wording of the fourth article of the Declaration of Paris.

### § 270.

The legality of commercial blockades has been frequently discussed in modern times. A distinction has been drawn between them and strategic or military blockades, which are carried on with a view to the ultimate reduction of the place blockaded, whereas the object of commercial blockades is simply to stop ingress and egress, and weaken the resources of the enemy by cutting off his external trade. For this reason a strong feeling against them has grown up in the mercantile

Strategic and commercial blockades. The legality of the latter.

<sup>1</sup> *Tableau Général de l'Institut de Droit International*, pp. 202-204.

world. It is said that the harm they inflict upon neutrals is greater than the advantage they give to belligerents. This is probably true, under the present conditions of war and commerce, when the land frontiers of the country whose ports are blockaded abut upon the territory of civilized and neutral states. And it is quite possible for the blockading belligerent to be a sufferer by the success of his own operations. The chief effect of the blockade of Russian ports in the Crimean War was to raise the price of hemp and tallow and other Russian products in the English market. Goods that were formerly brought over the sea from Riga and Odessa were taken by land into Germany at far greater expense, and shipped from the Baltic ports of Prussia. But on the other hand nothing can be more effective than an extensive and well-enforced commercial blockade in diminishing the resources of a country whose ports are its chief avenue of communication with the outside world. In the American Civil War, while the South had a vast seaboard and numerous ports, its territory touched but one neutral state, and that was poor and undeveloped. Little trade could come across the Mexican border; and when the fleets of the North were able to maintain an efficient blockade of the entire coast of the Confederacy, few supplies from abroad could enter the country and few domestic products could go out to be exchanged for munitions of war. There can be no doubt that this isolation contributed more than any other single cause to the triumph of the Union arms. Little blood was shed to bring it about, and yet it was more effective than many battles. A still more remarkable demonstration of the efficiency of commercial blockades under favorable conditions is afforded by a glance at the position of Great Britain as an island power. Two-thirds of her food supplies are imported; and if it were possible for her shores to be effectively blockaded, she would be reduced to sue for terms in a few weeks. With such facts as these before them it is hardly likely that strong maritime

belligerents will give up the right of cutting off the trade of their enemies with the rest of the world. Before 1861 the United States gave occasional expression in their diplomatic documents to the impatience of commercial blockades felt by neutral and mercantile communities. General Cass, for instance, wrote as Secretary of State in 1859 that "the blockade of a coast . . . with the real design of carrying on a war against trade, and from its nature against the trade of peaceable and friendly powers, instead of a war against armed men, is a proceeding which it is difficult to reconcile with reason or with the opinions of modern times."<sup>1</sup> Yet less than two years afterwards President Lincoln established the largest and most efficacious commercial blockade recorded in history. After its action in the Civil War the Government of Washington cannot with any show of consistency object to similar treatment of hostile coasts by other states. But we may perhaps hope that the occasions for such treatment will in future be very rare. A belligerent will not often be able to exhaust an opponent by cutting off its sea-borne commerce; and unless he can show a clear prospect of bringing the war to a speedy termination in this way, the pressure of neutral states will be so great that he will hardly venture upon an operation far more likely to be detrimental to them than beneficial to him.

### § 271.

In considering the law of blockade it will be convenient to arrange it under heads. We cannot hope to improve upon the classification made by Lord Stowell in the case of the *Betsy*,<sup>1</sup> which he decided in 1798. The heads of the law of blockade. One of the two main points to be determined was whether a captured American vessel had broken a legal blockade of the island of Guadeloupe. With regard to this the learned

<sup>1</sup> Wharton, *International Law of the United States*, § 361.

<sup>2</sup> Robinson, *Admiralty Reports*, I., 93.

judge remarked, "On the question of blockade three things must be proved: 1st, The existence of an actual blockade; 2d, The knowledge of the party; and 3d, Some act of violation either by going in, or by coming out with a cargo laden after the commencement of the blockade." The statement of the third of these heads must be slightly altered in order to make it absolutely accurate. This change, and the addition of a few words on the penalty for breach of blockade, will enable us to give a clear outline of the accepted rules on the subject.

### § 272.

We have first to deal with

#### *The existence of an actual blockade.*

Our historical sketch<sup>1</sup> has already shown us that what are called paper blockades are no longer recognized. We need not add further proof of a proposition which has been admitted on all sides for more than a hundred years. At the commencement of a blockade, neutral powers are not exacting in their requirements as to the force necessary to make it effective. But if, after a reasonable time has elapsed, their warnings remain unheeded, and the number of vessels stationed off the blockaded ports is obviously insufficient to close them, their government will decline to recognize the validity of any captures of their merchantmen for breach of the so-called blockade, and will demand reparation for illegal seizures and condemnations. The ingress or egress of vessels when the weather gives them special advantages, or during the temporary absence of the blockading squadron owing to a storm or for the purpose of a chase or an engagement, does not render the blockade ineffective. All International Law requires is that the attempt to run in or out shall be attended by manifest and pressing danger. Moreover, the vessels engaged in

The existence of an actual blockade.

<sup>1</sup> See § 269.

maintaining a blockade need not be stationed in close proximity to the port they close. The conformation of the coast, the nature of the channels, the set of the currents, and the neutral or belligerent character of the sovereignty exercised over the adjoining territory, are all elements in determining the position of the blockaders. In the Crimean War the port of Riga was blockaded by a single British vessel, stationed a hundred and twenty miles from the town in a narrow channel which formed the only navigable approach to the place.<sup>1</sup> But had one shore been neutral territory, and had the channel communicated with neutral as well as belligerent ports, the proceeding would have been inadmissible. In the American Civil War the Federal government did not attempt to include the mouth of the Rio Grande in its blockade of the Southern coast, because the middle of the stream formed the boundary between the United States and Mexico, and the Mexican port of Matamoras was situated within the estuary.<sup>2</sup> A blockade cannot extend beyond the area covered by the operations of the force which maintains it. This principle was laid down in the case of the *Stert*.<sup>3</sup> The court held that goods coming from a blockaded port by means of interior canal navigation which was perfectly open were free from hostile seizure. But it is not necessary that channels should in every case be closed by ships, though a maritime blockade without vessels to support it would be a contradiction in terms. As an operation supplementary to those of the fleet, a waterway may be closed by stones, sunken hulls, torpedoes or other obstructions. When, in 1861, Earl Russell remonstrated on behalf of the British Government against the attempt made by the Federal forces to block up some of the approaches to Charleston and Savannah by sinking vessels in the channels, Mr. Seward replied that the obstructions were only tem-

<sup>1</sup> Hall, *International Law*, § 280.

<sup>2</sup> Wharton, *International Law of the United States*, § 359.

<sup>3</sup> Robinson, *Admiralty Reports*, IV., 65.

porary and would be removed at the termination of the war. In this particular case there was no intention to inflict permanent injury upon "the commerce of nations and the free intercourse of the Southern States of America with the civilized world."<sup>1</sup> But even if such a design had been entertained, it is difficult to see on what grounds of law neutrals could protest against it. A belligerent, who may knock the fortified ports of his enemy to pieces by bombardment if they resist his attack, may surely destroy the approaches to them from the sea in order to further the objects of his war. Neutrals are jealous, and properly jealous, of methods which inflict severe injury on their trade; but they can hardly claim to make its future prosperity the measure of the legality of hostile acts. There is, however, one form of closure which states are not free to adopt. In case they are attempting to put down a domestic revolt, they cannot shut up ports in possession of the insurgents by merely declaring them no longer open to trade. Great Britain maintained this position successfully in 1861 against both New Granada and the United States. The government of each of these countries claimed a right to close by municipal regulation, and not by blockade, certain ports held by revolted citizens. The discussion which followed made it quite clear that such a claim cannot be sustained. A state is free to exclude both foreign and domestic vessels from any harbor over which it actually exercises the powers of sovereignty. But when its authority is at an end owing to insurrection or belligerent occupation by a hostile force, it must fall back upon warlike measures; and the only warlike measure which will lawfully close a port against neutral commerce is an effective blockade.<sup>2</sup>

A blockade ceases to exist when the war terminates, or when the government which has instituted it withdraws the

<sup>1</sup> Glass, *Marine International Law*, pp. 107, 108.

<sup>2</sup> Wharton, *International Law of the United States*, §§ 359, 361; Glass, *Marine International Law*, pp. 105-107.

forces engaged in carrying it on. It is also terminated if the blockading squadron is defeated and driven off by a hostile force. But the victory of the attacking party must be complete. It is not enough to destroy a vessel or two, if a number sufficient to carry on the blockade are left uninjured and still at their stations. Nor would the port be opened if an outlying naval force was driven in upon its supports, and the main body remained unaffected by the blow. It must further be held that the occupation by a victorious belligerent of a place under blockade by another portion of its forces, puts an immediate end to the operations of the blockading ships, and renders illegal any further seizure by them of neutral vessels. The contrary doctrine was laid down by the Supreme Court of the United States in the case of the *Circassian*,<sup>1</sup> an English vessel which was captured and condemned for attempting to run the blockade of New Orleans after the city had been taken by the Union forces. But the Mixed Commission, appointed under Article XII. of the Treaty of Washington, gave compensation for wrongful seizure to the owners of the vessel.<sup>2</sup> It is evident that a right which can be exercised only against hostile places comes to an end when such places cease to be hostile. If a belligerent, who has succeeded in occupying a port belonging to his enemy, wishes to shut it against neutral trade, he must do so by municipal closure, not by International blockade

### § 273.

The next head to demand attention is

*The knowledge of the party supposed to have offended.*

Something more than the establishment of an efficient blockade is necessary in order to endow the blockaders with the

<sup>1</sup> Wallace, *Reports of the United States Supreme Court*, II., 135.

<sup>2</sup> Wharton, *International Law of the United States*, § 359; *Treaties of the United States*, p. 484.

right to capture vessels attempting to enter or leave the blockaded port. It is necessary that the existence of the blockade should be known to those who are accused of breaking it. Due notice must, therefore, be given to neutral traders and ship owners.

The knowledge of the party supposed to have offended.

Those who are within a blockaded port are always presumed to be aware of the blockade. But according to British and American practice notification to those outside may be either actual or constructive. It is actual when the blockaders stop a vessel attempting to enter, and endorse on its register a warning to the effect that the port in question is closed and must not in future be approached. It is constructive when the blockade is notorious all over the mercantile world or when a diplomatic notification has been given to neutral states, notice to a government being held to be equivalent to notice to all its subjects. This doctrine was clearly laid down by Lord Stowell in the case of the *Neptunus*,<sup>1</sup> and was followed by the courts of the United States in the great American Civil War, though the action of the executive at Washington has not always been consistent with it. Several of the earlier treaties of the United States provide that no vessel shall be condemned for breach of blockade, unless she has received notice on her voyage that her port of destination is blockaded; and the rule in question was embodied in so recent a diplomatic document as the treaty with Italy of 1871.<sup>2</sup> When President Lincoln instituted a blockade of the coast of the Confederacy, his proclamation of April 19, 1861, declared that if any vessel approached a blockaded port she would be "duly warned by the commander of one of the blockading vessels, who will endorse on her register the fact and date of such warning; and, if the same vessel shall again attempt to enter or leave the blockaded port, she will be captured." But in all cases which came before the Courts it was decided that the provisions for giving warning

<sup>1</sup> Robinson, *Admiralty Reports*, II., 111.

<sup>2</sup> *Treaties of the United States*, p. 584.



to vessels applied only to those which approached in ignorance of the existence of the blockade. Previous knowledge, however acquired, was held to subject neutrals to capture and condemnation. No complaint of this construction was made by other powers; and throughout the war the rules of the English Prize Courts on the subject of notification were enforced by the tribunals of the United States.<sup>1</sup>

France is the chief of a group of states whose practice differs from that of the English-speaking peoples and the powers, like Prussia and Denmark, which follow their example. Her doctrine is that each neutral trader as he approaches the blockaded spot is entitled to a warning from one of the blockading squadron. It is held that unless a ship has been so warned it is not liable to seizure. Blockade is regarded as an operation which may cease at any time from any one of a variety of causes, and consequently neutrals must be allowed to inquire at the blockaded port itself whether it is still closed to their commerce. General diplomatic notification is given by the French Government to other states as a matter of courtesy, though according to French usage its presence or absence makes no difference in the legal position of the parties concerned. There can be no doubt that France and Spain, and the other powers which adopt the same rule, are thereby granting a concession to neutrals. International Law demands knowledge as a condition precedent to condemnation. But it does not lay down further conditions as to the way in which the knowledge in question must be acquired. If a state chooses to ignore all ways but one, it must often allow offenders to depart unmolested. With modern facilities for communication the truth as to the continuous existence of a blockade must be known in ninety-nine cases out of a hundred all over the civilized world, and in the one case where there is honest ignorance British practice allows proof of it to be given.

<sup>1</sup> For the whole matter, see Wheaton, *International Law* (Dana's ed.), note 235.

The advantage of simplicity is certainly possessed by the French rule. British and American practice is much more complicated. It necessitates a distinction between blockades *de facto* only and notified blockades, the former being maintained by a sufficient force but not brought diplomatically to the notice of neutral governments, while the latter are not only effective in point of fact but are also made the subjects of diplomatic communications. As a rule notification is given to foreign powers; but exceptional circumstances may cause its omission. If, for instance, the commander of a squadron operating at a great distance from his country sees fit in some sudden emergency to institute a blockade, it will not be notified for some time, if at all; and yet it will be lawful, unless disavowed by the home government. The absence of formal diplomatic notice, from whatever cause it may spring, has no effect upon the validity of the blockade, though it makes a great difference with regard to the circumstances under which a Prize Court will pronounce a sentence of condemnation.

According to what may be termed the British rules, when a blockade has been duly notified to neutral governments the burden of proof of ignorance of it rests upon neutral shipmasters, whereas in the case of a blockade *de facto* only the burden of proof of knowledge rests on the captors. In the case of the *Neptunus* already referred to, Lord Stowell went so far as to say, "a neutral master can never be held to aver against a notification of blockade, that he is ignorant of it."<sup>1</sup> But we may feel certain that this severe doctrine would not be acted upon to-day. Indeed, its author allowed exceptions which practically destroyed it. For instance, in the case of the *Betsy*, an American vessel brought in for adjudication in 1799 on a charge of attempting to break the blockade of Amsterdam, he ordered restoration on the ground that the distance of the United States from the scene of warfare made it reasonable for American vessels to be allowed to inquire

<sup>1</sup> Robinson, *Admiralty Reports*, II., 113.

in Europe whether a notified blockade known to have been instituted when they started was still in existence on their arrival.<sup>1</sup> A similar but considerably wider permission to inquire was given, not merely to European vessels, but to all neutral ships, by the Prize Courts of the United States in the American Civil War. Judge Betts discussed the question in the case of the *Empress*,<sup>2</sup> and granted a right of inquiry subject to the two conditions that the intention to inquire and go elsewhere if the blockade was still enforced was clearly set forth in the ship's papers, and that the information was not sought at the blockaded port. Commercial interests are now powerful enough to demand that if the shipmaster be really ignorant he shall be allowed to prove his lack of knowledge, even when the blockade has been notified to his government. On the other hand the case of the *Franciska*<sup>3</sup> shows that, although no notification has taken place and the blockade is a blockade *de facto* only, its notoriety will raise a presumption of knowledge which the neutral captain must rebut if he is to save his vessel from confiscation.

Another difference between the legal effects of notified and unnotified blockades refers to the exact period at which the vessel is held to have become liable to capture. Where diplomatic notice has been given "the act of sailing for a blockaded place is sufficient to constitute the offence." The presumption is that the blockade continues, if no notification of its termination has been received. A breach of blockade is therefore committed the moment the vessel leaves neutral waters for the forbidden destination. A guilty intention exists from the beginning. The ship is *in delicto*, and can be captured and condemned. But where there has been no diplomatic notice, there can be no presumption of the continuance of the blockade, "and the ignorance of the party may be admitted as an excuse for sailing on a doubtful and

<sup>1</sup> Robinson, *Admiralty Reports*, I., 332.

<sup>2</sup> Blatchford, *Prize Cases*, p. 178.

<sup>3</sup> Moore, *Privy Council Cases*, X., 58.

provisional destination.”<sup>1</sup> In such a case the offence does not commence as soon as the voyage begins. It cannot be held to attach to the vessel until her captain has learned by inquiry *en route* that the blockade is still maintained and has nevertheless continued his course for the forbidden port.

The last distinction is concerned with the permanence of the blockade. If no notification has been given the termination of the fact puts an end to its legal consequences. But if diplomatic notice has been sent to neutral governments, the occasional removal of the blockading vessels to chase an enemy or escape a storm, or for any other temporary purpose, does not open the port. It still remains legally closed, and vessels which enter or leave it are subject to capture and condemnation for breach of blockade. A blockade by notification is presumed to continue until its discontinuance has been notified, unless the blockaders have been driven away by the enemy, in which case it is at an end, and a fresh notification is required if it is afterwards renewed. Lord Stowell laid down the rule in the case of the *Neptunus*,<sup>2</sup> a vessel captured in attempting to escape from the Texel in 1798, and the exception in the case of the *Triheten*,<sup>3</sup> a vessel taken on a voyage to the port of St. Lucar, from which the British blockading squadron had been driven some time before. This *Neptunus* must not be confounded with another case of the same name previously cited, though both are concerned with the difference between blockades *de facto* only and blockades by notification. The doctrines acted upon in it were adopted by the United States in the Civil War. On one occasion the harbor of Charleston remained open for five days, on account of the absence of a vessel which had been sent to intercept a cargo of arms expected elsewhere, but it was maintained that no interruption of the blockade took place, seeing that it had been duly notified to neutral powers.<sup>4</sup>

<sup>1</sup> See the *Neptunus*, Robinson, *Admiralty Reports*, II., 113.

<sup>2</sup> Robinson, *Admiralty Reports*, I., 171.

<sup>3</sup> *Ibid.*, VI., 67.

<sup>4</sup> Glass, *Marine International Law*, p. 91.

## § 274.

Knowledge of an effective blockade is as consistent with innocence of any attempt to break it as knowledge of the existence of a purse in a neighbor's pocket is consistent with perfect honesty. To create an offence something beyond the presence of information is required. There must be in addition

*An act of violation of blockade.*

When Lord Stowell dealt with this point in the passage previously quoted,<sup>1</sup> the words he used were "Some act of violation either by going in, or by coming out with a cargo laden after the commencement of the blockade." But it is clear that these expressions require enlargement, because, as we have seen in the preceding section, under certain circumstances the mere act of sailing for a blockaded port constitutes the offence, and the neutral vessel is subject to capture as soon as she appears on the high seas bound for the forbidden destination. In all great blockades vessels are constantly seized before they have come near enough to the closed harbor to make any attempt to enter it. With the addition necessitated by these considerations the statement of the great English judge will stand.

We must notice that egress is forbidden as well as ingress ; but a custom has sprung up of granting to neutral vessels found in a belligerent port at the commencement of a blockade a fixed period within which they may leave without fear of molestation. Fifteen days was the time fixed at the commencement of the great American Civil War. Special indulgence is sometimes given in cases where extensive repairs are needed, or other circumstances beyond the control of the shipmaster prevent the departure of the vessel within the days of grace. With regard to the cargo, the rule is that what was laded before the commencement of the blockade may be taken out, but not what was taken on board after

<sup>1</sup> See § 271.

the closure of the port. This was laid down by Lord Stowell in 1798 in the case of the *Betsy*,<sup>1</sup> and his doctrine was followed by Judge Betts in 1861 in the case of the *Hiawatha*<sup>2</sup> and applied by the courts of the United States throughout the war of Secession. The great English jurist gave indulgence in the case of the *Juffrow Maria Shræder*<sup>3</sup> to goods sent in to the port of Havre before the blockade commenced, but re-shipped afterwards in order to be withdrawn by the neutral proprietor; and it is scarcely possible to doubt that a similar immunity from capture would be granted in a similar case to-day. Indeed the treaty of 1871 between the United States and Italy goes farther, and makes an inroad on the strictness of the old rule that any attempt to escape with cargo laden after the commencement of the blockade may be punished by capture and condemnation. It stipulates that a vessel of either of the contracting parties which attempts to carry such cargo out of a port blockaded by the vessels of the other, shall be warned to return and discharge it, and shall not be captured unless she tries a second time to escape with it on board.<sup>4</sup>

It is not necessary to labor the point that an attempt to enter a blockaded port is an act of violation which subjects the vessel concerned in it to capture and condemnation. We saw in the preceding section that in the case of a notified blockade, or a blockade the existence of which was notorious, neutral vessels were held to be *in delicto* from the moment they left their own ports and waters on the voyage to the blockaded port. But if during the voyage the blockade ceases, whether from the termination of the war or from any other cause, the offence ceases also and the vessel is no longer liable to hostile seizure. Moreover, if during the voyage information is received from a source above suspicion that

<sup>1</sup> Robinson, *Admiralty Reports*, I., 93.

<sup>2</sup> Blatchford, *Prize Cases*, p. 19.

<sup>3</sup> Robinson, *Admiralty Reports*, IV., 89, note.

<sup>4</sup> *Treaties of the United States*, p. 584.

the blockade is raised, the shipmaster may proceed in safety, and is entitled to a warning should it turn out that he has been misinformed. Lord Stowell acted on this principle in the case of the *Neptunus*<sup>1</sup> decided in 1799. Her captain had been told, and as it turned out wrongly told, by the commander of a British frigate, that Havre was no longer blockaded. In attempting to enter his ship was seized, but the learned judge released it on the ground that under the circumstances no offence had been committed. What was deemed a good reason for leniency nearly a century ago, would certainly be regarded as a sufficient answer to a captor's claim to-day.

It is universally admitted that vessels driven into a blockaded port by stress of weather are not liable to capture; but they must not take advantage of their entry to dispose of any of the cargo they carry. It must be brought out intact on their departure. The courtesy of the blockading belligerent generally allows neutral vessels of war to enter and depart freely; but the better opinion appears to be that permission is granted as a favor and cannot be claimed as a right. In some recent wars it has been extended to mail steamers under guarantee that they would not use their immunity as a cloak for forbidden trade.<sup>2</sup>

### § 275.

The usual penalty for breach of blockade is the confiscation of the ship and cargo; the older and severer practice, which allowed the infliction of imprisonment The penalty for breach of blockade. or even death on the crew, having been discontinued in the eighteenth century. The offence attaches first and foremost to the ship, and therefore it alone is condemned if the cargo belongs to a different owner and he did not know that the port of destination was blockaded. But the burden of proof of ignorance rests upon him. The

<sup>1</sup> Robinson, *Admiralty Reports*, II., 114.

<sup>2</sup> Glass, *Marine International Law*, p. 102.

presumption is that he knew the destination of the vehicle which carried his goods. Lord Stowell stated in the case of the *Adonis*<sup>1</sup> that, when a vessel starts for an innocent destination and during the voyage the captain deviates to a blockaded port, cargo owned by a person other than the owner of the ship may be released, provided the existence of the blockade was not known at the commencement of the voyage. In the case of the *Alexander*,<sup>2</sup> however, he declined to apply this doctrine when the deviation had taken place to a port known to be under blockade when the vessel started; but the decision turned a good deal upon special circumstances of fraud, and possibly it would not be followed by a court of the present day. The captain is the agent of the owners of the ship, not of the owners of the cargo unless they specially appoint him. It seems hard, therefore, to make them responsible for his wrong-doing, without allowing them an opportunity of showing that he acted in entire independence of their wishes.

The offence of breaking blockade clings to the vessel till the termination of her return voyage. Even if she has succeeded in slipping in and out in safety, she may be captured on her way home by any cruiser of the blockading belligerent. This was the rule laid down by the British Prize Courts at the close of the eighteenth century;<sup>3</sup> and it was followed by the courts of the United States in the American Civil War. But all liability to seizure and condemnation comes to an end, if the blockade ceases while the vessel which has broken it is still on the high seas.

### § 276.

We have reserved to the last a consideration of the doctrine of continuous voyages and its application to blockade.

<sup>1</sup> Robinson, *Admiralty Reports*, V., 262.

<sup>2</sup> *Ibid.*, IV., 93.

<sup>3</sup> See Lord Stowell's judgment in the case of the *Juffrow Maria Schrader*, Robinson, *Admiralty Reports*, III., 163.



It was invented by the British Prize Courts during the struggle with Revolutionary and Imperial France, in order to put a stop to the evasions of their rule that neutrals might not trade between the enemy's colonies and his home ports, when such trade had been closed to them in time of peace. This was called The Rule of War of 1756, from the date at which it was first applied. We need not stop to discuss the dead issue of its goodness or badness. The state of affairs which called it into being is not likely to arise again; for the great maritime powers have long ceased to monopolize their colonial trade, and the second article of the Declaration of Paris gives to neutral ships the right of carrying enemy property as long as it is not contraband of war. The rule of 1756 was applied in the war which broke out in 1793, and though relaxations of it were granted from time to time, it remained to the end a great hindrance to neutral commerce. The United States were the chief sufferers.<sup>1</sup> They protested loudly against the condemnation of American vessels under it; and the ingenuity of their merchants and seamen was exercised to find ways of trading between France and her colonies in spite of it. A common device was to sail from a colonial port to an American port and from thence to Europe, trade between the enemy's colonies and America, and between America and Europe, being allowed by the British authorities. The British courts in return elaborated a theory that in such cases the two voyages were in reality but one voyage, in which a forbidden cargo was carried to a forbidden destination. They regarded such circumstances as the payment of duties at American ports or the sale of the cargo as mere blinds, and in the case of the *Maria* <sup>2</sup> laid down the rule that the offence was committed unless the goods were imported into the common stock of the country to which they were first carried.

The doctrine of continuous voyages and its application to blockade.

<sup>1</sup> Wharton, *International Law of the United States*, § 388.

<sup>2</sup> Robinson, *Admiralty Reports*, V., 387.

Whatever may be thought of the occasion which called the theory of continuous voyages into life, there can be no doubt that the doctrine itself is sound. It has been applied both to blockade and to contraband. The British Manual of Naval Prize Law issued in 1888 states that when a vessel is ostensibly bound for "a neutral or unblockaded enemy port, while she is in reality intended after touching there to go on to a blockaded port, . . . her destination is held to be for the blockaded port from the time of sailing."<sup>1</sup> In the American Civil War the courts of the United States carried the doctrine a step further, and condemned neutral ships captured on a voyage to a neutral port, not only when there was good reason to believe that the vessels themselves were intended to proceed further and make an attempt to enter one of the blockaded harbors of the Southern Confederacy, but also when it was suspected that their cargoes were to be transferred in the neutral port to other steamers in order to be carried by them through the blockading squadron. The question arose in connection with Nassau, a British port on New Providence, one of the Bahama Islands. It lies within easy reach of the coast of Florida and Georgia; and when the war broke out it sprang into sudden activity as a centre of forbidden trade. Blockade-runners resorted to its waters, and made it the starting-point of their dashes at the Southern ports. The courts of the United States naturally desired to stop these unlawful adventures; and in the attempt to do so they applied and enlarged the old doctrine of continuous voyages. The soundness of their extension of it was contested in a group of cases, the most important of which was the *Springbok*,<sup>2</sup> a British vessel captured in 1863 on a voyage from Liverpool to Nassau, and condemned along with her cargo by the District Court of New York on the ground that her true destination was not Nassau, but one of the blockaded ports. In 1866 the Supreme Court reversed this

<sup>1</sup> Holland, *Naval Prize Law*, p. 38.

<sup>2</sup> Wallace, *Reports of the U. S. Supreme Court*, V., 1.

decision as far as the ship was concerned, having come to the conclusion that her papers were regular and her real destination neutral. But a majority of the judges confirmed the condemnation of the cargo, because they were satisfied that its owners intended it to be sent on from Nassau in some other vessel to some place on the blockaded Southern coast. The grounds on which they based this inference have since been questioned. But, putting aside disputes as to fact, the statements of law involved in the decision are open to grave doubt. If a belligerent may capture a neutral vessel honestly intended for a neutral port, and condemn her cargo because he vaguely suspects it will be transferred to some vessel unknown to him, and sent on to some hostile destination also unknown to him, a new disability has been imposed upon neutral commerce. States at war will in future be able to establish what has well been called a blockade by interpretation of any neutral port situated near the coast of an enemy. For instance, in the present (1894) conflict between Japan and China, Japanese cruisers may, if the doctrine we are discussing be correct, capture any neutral merchantmen bound for Hong-Kong, on the plea that its cargo may possibly be sent on from that port to a blockaded harbor of China. No wonder that international jurists of all countries, including the United States, shrunk from consequences such as these, and condemned the decision in the *Springbok* case with a close approach to unanimity. Many of them have published their views; and in 1882 a commission of the *Institut de droit International* voted without a dissentient voice that the judgment was subversive of an established rule of maritime warfare and a serious inroad on the rights of neutrals.<sup>1</sup> Its authority has been seriously impaired by this chorus of disapproval. The utmost that

<sup>1</sup> An excellent account of the case of the *Springbok* and the controversy to which it gave rise will be found in Wharton, *International Law of the United States*, § 362, and in Travers Twiss, *Belligerent Right on the High Seas*, pp. 18-32.

can be allowed is that, if the captors have clear and definite proof that the destination of the cargo is hostile while that of the vessel is neutral, the courts may separate between the two and condemn the former while releasing the latter. Further it is impossible to go without inflicting grave injustice on neutral trade.

## CHAPTER VI.

### CONTRABAND TRADE.

#### § 277.

EVERY belligerent may capture goods of direct and immediate use in war, if he is able to intercept them on their passage to his enemy in any place where it is lawful to carry on hostilities. But neutral merchants may trade in arms, ammunition and stores in time of war, as well as in time of peace. Thus a conflict of rights arises; and it is the task of International Law to make some compromise between the admitted claims of belligerents on the one hand and neutrals on the other. This it does by allowing the subjects of neutral states to carry contraband to either belligerent, but insisting that they shall do so at their own risk. Their government is not bound to restrain them from trading in the forbidden goods, neither has it any right to interfere on their behalf if the articles in question are captured by one belligerent on their way to the other. Whenever a trade in contraband of war reaches large dimensions, the state whose adversary is supplied by means of it is apt to complain. It reproaches the government of the offending vendors with neglect of the duties of neutrality, and argues that friendship and impartiality alike demand the stoppage of a traffic which supplies its foe with the sinews of war. But it invariably receives in reply a reminder that the practice of nations imposes no such obligation upon neu-

The nature of  
contraband trade.  
Neutral states are  
not bound to  
stop it.

tral powers. They are bound to prevent the departure of armed expeditions from their shores and the supply of fighting gear to belligerent vessels in their ports. When this is done, the utmost that can be expected of them in the matter of ordinary business transactions is that they shall warn their subjects of the risks run by carriers of contraband merchandise, and give notice that those who incur them will not be protected by the force or the influence of the state. Several important international controversies have been conducted on these lines. Thus, when in 1793 Great Britain complained of the sale of arms and accoutrements to an agent of the French Government in the United States, Jefferson, who was the Secretary of State in Washington's Cabinet, replied that American citizens "have always been free to make, vend and export arms. It is the constant occupation and livelihood of some of them. To suppress their callings, the only means, perhaps, of their subsistence, because a war exists in foreign and distant countries, in which we have no concern, would scarcely be expected. It would be hard in principle and impossible in practice. The law of nations, therefore, respecting the rights of those at peace, does not require from them such an internal derangement in their occupations. It is satisfied with the external penalty pronounced in the President's proclamation, that of confiscation of such portion of these arms as shall fall into the hands of the belligerent powers on their way to the ports of their enemies. To this penalty our citizens are warned that they will be abandoned."<sup>1</sup> These words were quoted on behalf of Great Britain when the positions of the two powers were reversed, and the United States, in the case submitted by them to the Geneva Arbitrators in 1872, ranked among their causes of complaint against the British Government its refusal to put a stop to the trade in contraband of war carried on between England and the ports of the Southern

<sup>1</sup> Wharton, *International Law of the United States*, § 391.

Confederacy.<sup>1</sup> On this occasion, as in 1793, the answer of the neutral was deemed conclusive. The British Government did not press its complaint against the administration of Washington, and the Board which arbitrated on the Alabama Claims gave no damages to the United States in respect of the purchase of arms in England by Confederate agents. Indeed the conduct of commercial states when neutral puts out of court any complaints they may make when belligerent. Prussia, for instance, whose merchants had conducted an enormous trade in contraband goods across her eastern frontiers during the Crimean War, denounced in vigorous language the conduct of the British authorities in permitting English firms to sell arms and ammunition to France in 1870.<sup>2</sup> Moreover, belligerents themselves often take advantage of that freedom of trade they deem monstrous and unfriendly when it operates to the benefit of their foes. The United States Government sent agents to England for the purchase of munitions of all kinds during the first two years of the struggle with the revolted South. France in 1795 complained loudly of the capture of neutral ships laden with supplies of food for her suffering people; but in 1885 she claimed the right to seize and confiscate cargoes of rice carried by neutrals to certain ports of China, on the ground that rice was an important article in the diet of the Chinese people. It was then the turn of Great Britain to resist the attempt. She gave notice that she would not recognize the validity of any condemnations of her merchantmen engaged in the rice trade, unless they were carrying the grain to Chinese camps or places of naval or military equipment.<sup>3</sup> Fortunately the war came to an end before a case arose; and it is hardly likely that France will renew

<sup>1</sup> *American Case*, Pt. IV. ; *British Counter Case*, Pt. IV.

<sup>2</sup> *British State Papers, Franco-German War, No. 3 (1870)*, pp. 72, 73, 75-77, 97.

<sup>3</sup> *Documents Diplomatiques, Affaires de Chine (1885)*, pp. 29-32; *British State Papers, France, No. 1 (1885)*, pp. 14-21.

claims so contrary to justice and to her own previous contentions. It would be easy to multiply instances. The conduct of states in the matter of contraband trade has been guided far more by the self-interest of the moment than by any considerations of principle. But amid all the inconsistencies of international recrimination one fact stands out clear and indubitable. No powerful neutral state has ever interfered to stop a trade in arms and ammunition carried on by its subjects with agents of a belligerent government. No belligerent has ever been prevented by moral scruples or legal prohibitions from buying war material in neutral markets. It is impossible, therefore, to avoid the conclusion that the only restraint on such a trade known to International Law is the liability of contraband to capture, even under a neutral flag. So clear is this that nearly every writer of repute embodies it in his account of the law of contraband. The little band who hold that neutral powers are bound to prohibit the sale of arms and other instruments of warfare within their territory to belligerent agents, base their arguments upon what they deem considerations of justice and equity, which in their judgment override the practice of states.<sup>1</sup> Others, who do not feel at liberty to construct their systems without some reference to the arrangements of international society, but nevertheless desire to place as many restrictions as possible upon trade in contraband, have drawn a distinction between large and small commercial transactions.<sup>2</sup> The latter they regard as a continuation of such ordinary trade as may have existed before the war, whereas the former are called into existence by the war and cannot be considered as in any sense a prolongation of the previous operations of neutral merchants. If these statements are to be regarded as an expression of existing law, it is sufficient to say that the rule they advo-

<sup>1</sup> Hautefeuille, *Droits des Nations Neutres*, Vol. II., Tit. VIII., Sec. III.; Phillimore, III., § CCXXX.

<sup>2</sup> Bluntschli, *Droit International Codifié*, § 78.



cate has never been adopted. If, on the other hand, they are held to set forth what the law ought to be, we may remark that the difficulty of drawing a line between a small trade and a large one is so great as to amount to impossibility. Moreover, it is by no means certain that international trade in arms on a large scale is confined to times of war. A firm like Krupp of Essen makes artillery for half the armies of the civilized world during periods of profound peace. And lastly, it may be argued that the burden placed by the proposed rule upon neutral governments would be too great for them to bear.<sup>1</sup> The stoppage of large shipments of arms for belligerent purposes from the ports of a great commercial country would require for its effective enforcement an army of spies and informers. And when a state had dislocated its commerce and roused the anger of its trading classes, it might possibly find itself arraigned before an international tribunal for lack of "due diligence," and cast in damages because a few cargoes had slipped through the cordon it maintained against its own subjects. The growth of a moral sentiment against making money out of the miseries of warfare may in time check the eagerness of neutral merchants to engage in contraband trade. Meanwhile belligerents must trust to the efficiency of their own measures of police on the high seas to keep cargoes of war-like stores out of the ports of their enemies. The proposal that neutral governments should be charged with the duty of preventing shipments of contraband goods from their ports to a belligerent destination has been revived in a recent report presented to the *Institut de Droit International*; but it has met with a cold reception.<sup>2</sup> Neither jurists nor statesmen are prepared to impose this additional burden upon the condition of neutrality.

<sup>1</sup> Westlake, Article in *Revue de Droit International*, II., 614-635.

<sup>2</sup> Rapport par MM. Kleen et Brusa; *Revue de Droit International*, XXVI., 401 et seq.

## § 278.

Since the law of nations gives to states at war the right of stopping neutral trade in contraband goods by the use of armed force on the high seas, it is obvious that some general agreement as to the articles which come under the description of contraband is necessary in order to avoid constant friction. But unfortunately no agreement exists except with regard to a very small portion of the large field to be covered. Arms and munitions of war are recognized as being contraband. Here, however, unanimity ends. Some doubt has been expressed even with regard to the materials from which gunpowder, dynamite and other means of destruction are made,<sup>1</sup> though the vast majority of authorities class them along with weapons and ammunition. Beyond this point all is confusion, and there is scarcely a single article as to which the greatest diversity of opinion and practice does not prevail. Grotius divided commodities into three classes: things of direct and immediate use in war, things useless for warlike purposes, and things useful in war and peace indifferently. The first were always contraband, the second never, and with regard to the third, *res ancipitis usus*, the circumstances of the contest were to be considered.<sup>2</sup> This classification is valuable, and would be more so were the various kinds of goods it embraces as plainly marked off from each other as birds and fishes or grain and trees. But there are no clear lines of demarcation between them. Cannon are always useful in war; but what of nitroglycerine, which may be used for blasting in mines or a dozen other peaceful purposes? Millinery is useless in war; but what of cloth, which may make tunics for soldiers as well as mantles for fashionable ladies? And with regard to the third class, which seems to have grown so rapidly at

What articles are  
contraband of  
war.

<sup>1</sup> Hautefeuille, *Droits des Nations Neutres*, Vol. II., Tit. VIII., Sec. II., § 3.

<sup>2</sup> *De Jure Belli ac Pacis*, III., I., V.

the expense of the other two, what circumstances are to be considered in the attempt to determine whether any particular article comprised in it is contraband or not? *Quot homines, tot sententiæ*. Whichever way we turn we meet nothing but disagreement and inconsistency. Publicist differs from publicist and state from state. Even the same state champions one policy at one time and another at another, and places different lists of contraband goods in different treaties negotiated during the same period. A full account of these diversities is given by Hall,<sup>1</sup> and to it the student is referred if he desires to make himself acquainted with their multitudinous details. As an example of what has taken place we may refer to the action of Great Britain and the United States with regard to two out of the many classes of disputed goods. The treaty of 1794 between these powers included naval stores in its list of contraband articles. Yet in the next year the United States expressly excluded them in its treaty with Spain, following thereby its own precedents in the French treaty of 1778, the Dutch treaty of 1782 and the Swedish treaty of 1783.<sup>2</sup> Horses were not included in the list of the British treaty of 1794; but they are expressly mentioned in the treaty of 1782 with the United Netherlands, though by its twenty-fourth article naval stores were ruled out in the most emphatic terms. The French treaty of 1778 included them. The French treaty of 1800 excluded them. They are mentioned as contraband in the treaty with Sweden of 1783 and the treaty with Spain of 1795. They are not mentioned in the Prussian treaties of 1785 and 1799.<sup>3</sup> During the present century a list of contraband goods has been inserted in many of the treaties of the United States, the general tendency being towards the inclusion of horses and the exclusion of naval stores. Great Britain on the other hand has preferred to

<sup>1</sup> *International Law*, Pt. IV., Ch. v.

<sup>2</sup> *Treaties of the United States*, pp. 304, 389, 756, 1011, 1045.

<sup>3</sup> *Ibid.*, pp. 303, 389, 756, 903, 911, 1011, 1044.

keep herself free from special agreements on the subject. Since the close of the last century she has entered into stipulations with regard to it very sparingly. But small in number as are her treaty-lists of contraband, they are not consistent with each other. Both horses and naval stores, for instance, were declared to be subject to confiscation in her treaty of 1810 with Portugal, but seventeen years after she agreed with Brazil to omit the former while retaining the latter.<sup>1</sup>

From these examples, which could be increased in number to an enormous extent if we examined the diplomatic history of all civilized states, it is evident that no authoritative list of contraband articles can be compiled from treaties. An examination of the works of publicists reveals a similar divergence and leads to a corresponding conclusion. But amid conflicting views it is possible to discern two main tendencies. The first, which favors a long list of contraband goods and leans to severity in dealing with them, may be called English, since its chief defenders are to be found among the jurists and statesmen of Great Britain. The second deems comparatively few articles to be contraband and is inclined to treat all doubtful cases with leniency. As its chief supporters are French, German and Italian writers, it may be called European. In this matter, as in so many others connected with maritime law, America occupies an intermediate position. In her treaties and her state papers she has generally followed European, and especially French, models; while her courts and her legal luminaries have as a rule supported English views.

The most authoritative exposition of the English doctrine is to be found in the *Manual of Naval Prize Law*, drawn up for the British Admiralty by Professor Holland of Oxford, in 1888. It divides contraband articles into Goods Absolutely Contraband and Goods Conditionally Contraband.

<sup>1</sup> G. F. de Martens, *Nouveau Recueil, Supplement*, VII., 211, and XI, 485, 486.

Among the former it reckons not only arms of all kinds and the machinery for manufacturing them, ammunition and the materials of which it is made, gun-cotton and clothing for soldiers, but also military and naval stores, including in the latter marine engines and their component parts, such as cylinders, shafts, boilers and fire-bars. These things are contraband always and in every case. They are condemned on mere inspection, provided, of course, that they are bound to an enemy destination. They carry their guilt on their face, and are invariably liable to seizure and confiscation. But in addition to these there are other large classes of goods which may be regarded as contraband under some circumstances and non-contraband under others. They are not to be condemned merely for being what they are. It is necessary to know more about them than their nature and description. All manner of collateral circumstances must be taken into account in deciding their fate. Whatever raises a presumption that they will be used for warlike purposes tells against them. Whatever tends to show that they will be consumed by peaceful non-combatants tells in their favor. It is for this reason that Professor Holland calls them goods conditionally contraband. He enumerates among them provisions, money, coals, horses and materials for the construction of railways and telegraphs.<sup>1</sup> It is obvious that the noxious or innocuous character of such things as these depends upon the use to which they are applied. Great Britain contends that they may lawfully suffer capture and condemnation when surrounding circumstances make it reasonably clear that they will be used for purposes of warfare. The immediate destination of the goods is held to be the best, though not the only, test of their final use. In the case of the *Yonge Margaretha*,<sup>2</sup> Lord Stowell condemned a cargo of cheeses bound for Brest, a port of naval equipment, the cheeses being such as were used in

<sup>1</sup> *Manual of Naval Prize Law*, p. 20.

<sup>2</sup> Robinson, *Admiralty Reports*, I., 194.

the French navy. Should the voyage be intended to terminate at the enemy's fleet, or a place where a portion of his army is encamped, there can be no doubt that condemnation would follow capture. The views thus expressed are spoken of collectively as the Doctrine of Occasional Contraband.

This doctrine is strongly opposed by the publicists of the European continent. One of the most recent of them, M. Richard Kleen, in a work published in 1893, examines the English decisions and pronounces against their validity.<sup>1</sup> He holds nothing to be contraband but objects expressly made for war and fitted for immediate employment in warlike operations. These objects in their completed form, or in parts which can be fitted together without a further process of alteration or manufacture, are liable to capture if found on their journey to an enemy destination.<sup>2</sup> But he adds that articles which do not come under these categories can never under any circumstances become lawful prize as contraband of war. He combats with much vigor the views set forth in the Manual of the British Admiralty, and declines to accept proof of the likelihood of hostile use as a sufficient reason for the seizure of goods capable in their own nature of innocent employment. Other continental writers are not so consistent. While they question the validity of the doctrine of occasional contraband, they nevertheless make admissions which involve its principle. Bluntschli, for instance, declares that such things as engines, horses and coal may be accounted contraband if it can be shown that they are destined for a warlike use.<sup>3</sup> Heffter ranks them among prohibited goods when their transport to a belligerent by a neutral affords assistance manifestly hostile in its nature.<sup>4</sup> Ortolan maintains that *res ancipitis usus* may be treated as contraband in very exceptional cases;

<sup>1</sup> *Contrebande de Guerre*, pp. 30-37.

<sup>2</sup> *Ibid.*, pp. 19-30, 32.

<sup>3</sup> *Droit International Codifié*, § 805.

<sup>4</sup> *Droit International*, § 160.

but he excepts from this exception provisions and other objects of first necessity.<sup>1</sup> Klüber admits the existence of doubtful cases, which must be ruled by surrounding circumstances.<sup>2</sup> These opinions concede all that is essential in the British position. In order to establish the doctrine of occasional contraband it is not necessary to show that every rule of the English Prize Courts is correct. Harsh decisions may have been given from time to time. The conclusion that the captured goods were really destined for warlike use may have been reached in many cases on the strength of presumptions insufficient to bear the weight of the superstructure reared upon them. All this may be admitted; and yet the fact remains that, by consent so general as to be almost universal, there are circumstances which will justify the seizure and condemnation as contraband of goods which are ordinarily innocent. Provisions are an excellent example. As a rule they are not captured; but, if they are stopped on their way to an enemy's force or a besieged place, they are taken without hesitation or scruple. This is the universal custom of belligerents, and the vast majority of publicists recognize its legality. In doing so, they admit in effect the proposition that what is not contraband at one time and under one set of conditions is contraband at another time and under another set of conditions. When this is allowed, the doctrine of occasional contraband is granted, and nothing remains but to settle its application. But it is just at this point that difficulties which have hitherto proved insuperable arise. Great Britain places many articles *ancipitis usus* in her list of goods absolutely contraband. Naval stores supply a case in point. Masts and spars, boiler-plates and screw-propellers are needed by peaceful merchantmen as well as by armed cruisers. Yet the Admiralty Manual classes them with arms and ammunition, and orders their capture if bound

<sup>1</sup> *Diplomatie de la Mer*, II., 179.

<sup>2</sup> *Droit des Gens Moderne de l'Europe*, § 288.

to a hostile port,<sup>1</sup> a rule which, naturally enough, finds no favor in the eyes of continental publicists.

As long as the subject remains in its present condition nothing can be looked for but constant bickering between belligerents and neutrals. If a great maritime war broke out, powerful commercial states might find themselves drawn into hostilities almost against their will. It is much to be wished that the leading powers of the civilized world would hold a friendly Congress to deal with the question. The only way to settle it is by common agreement, embodied in a great international instrument which should be subject to revision from time to time. The progress of science makes many weapons obsolete, and constantly adds new means of destruction to the resources of warfare. We sometimes find bucklers and coats of mail among the contraband articles enumerated in the treaties of the last century;<sup>2</sup> but there is no mention of dynamite, which is a recent invention, nor of boilers, paddle-wheels and screw-propellers, the application of steam to navigation being unknown till 1807. A hundred years ago balloons were scientific toys. To-day they are part of the equipment of every well-found army. With every year that passes, speed becomes more important in naval warfare, and consequently fuel approximates more closely to the position of a munition of war. All these changes raise questions far more easy to state than to settle. They have but added to the confusion existing beforehand. No solution of them has met with general acceptance. A brief account of the differences of opinion which have arisen with regard to coal will suffice to demonstrate the impossibility of arriving at any general rule in the absence of an international agreement. The Crimean War was the first maritime struggle of importance in which vessels of war were propelled by

<sup>1</sup> Holland, *Manual of Naval Prize Law*, p. 19.

<sup>2</sup> e.g. the treaty of 1778 between France and the United States. See *Treaties of the United States*, p. 303.



steam-power; and during its continuance the question of the contraband character of coal was first mooted. Great Britain regarded it as an article *incipitis usus* and applied to it her doctrine of occasional contraband.<sup>1</sup> She maintained the same view as a neutral in the war of 1859 between France and Piedmont on the one hand and Austria on the other. The Ministry of the day informed British subjects that coal might under certain circumstances be lawfully treated as contraband, and warned them that if they traded in it with belligerents they did so at their own risk. A few days later the French and Piedmontese Governments published formal notifications that they would not treat coal as contraband, and all through the war they refrained from seizing it, though their maritime preponderance enabled them to deal as they pleased with cargoes destined for Austrian ports.<sup>2</sup> Thus the usual positions of neutral and belligerent were reversed, and the latter applied a less rigorous rule than the former was willing to concede. In the American Civil War the Federal Government adopted the British view, though Mr. Cass, as Secretary of State, had argued against it in 1859. The courts of the United States have taken the same line as the executive; and there can be no doubt that the two great English-speaking nations stand together in this matter.<sup>3</sup> Their position, or a still stronger one, is held by Germany, whose statesmen in 1870 were not content with the willingness of the British Government to regard as contraband cargoes of coals bound for the French fleet in the North Sea, but claimed that all export of coal to the ports of France should be prohibited. France on this occasion repeated her declaration of 1859 that coal could not under any circumstances be regarded as contraband.<sup>4</sup> She is definitely pledged to this view, and a consid-

<sup>1</sup> Wheaton, *International Law* (Dana's ed.), p. 632, note.

<sup>2</sup> Klüber, *Droit des Gens Moderne de l'Europe*, § 288, note.

<sup>3</sup> Wharton, *International Law of the United States*, § 369; Glass, *Marine International Law*, pp. 118-132.

<sup>4</sup> Hall, *International Law*, § 244.

erable number of less important states have followed her lead. Russia, too, has adopted the more lenient doctrine in the most unequivocal manner. In December, 1884, her representative at the West African Conference went out of his way to declare that she did not mean to include coal in the articles excepted, as contraband, from the general freedom of navigation decreed for the Congo even in time of war.<sup>1</sup>

No ingenuity can reconcile divergencies such as these; and while they exist they are a menace to the peace of the civilized world. It might be possible for states to arrive at some agreement on the subject of contraband, if they could settle on a basis of discussion before they came together in conference. Could not such a basis be found in a frank acceptance by other powers of the British and American doctrine of occasional contraband, in return for the transfer to the conditionally contraband class of many articles now deemed absolutely contraband by Great Britain? If these mutual concessions were once made, no insuperable difficulty would be presented by the further task of deciding what circumstances connected with the destination of the vessel and the special needs of the enemy should be deemed sufficient to support the presumption that the goods were destined for an essentially warlike use, and were therefore fit subjects of belligerent capture. Thus two lists would come into existence, not at the dictation of belligerents anxious to make the utmost use of their naval power, or neutrals jealous of any interference with a lucrative commerce, but as the result of full discussion, carried on with the view of arriving at conclusions just to all. The first list would consist of those things which were contraband in their own nature, and liable to seizure and condemnation if found on their voyage to an enemy destination. It might with advantage be confined to arms and their component parts, together with ammunition and the materials from which it is made.

<sup>1</sup> British State Papers, *Africa No. 4 (1885)*, pp. 132, 133, 311.

The second list should include all articles capable of military use. They would be deemed contraband of war only when it was clear they were about to be employed for warlike purposes and were not likely to supply the needs of a peaceful population. Both lists would require periodical revision, for which provision should be made in the international document which called them into existence.

### § 279.

Few subjects in the whole range of International Law have given rise to more loose writing and thinking than that on which we are at present engaged. It therefore becomes necessary to use careful analysis in order to discover exactly what it is that constitutes the offence which a belligerent may deal with in the manner described in the beginning of this chapter. We must note in the first place that neutral traders are free to sell arms and other contraband goods within the neutral territory to agents of the warring powers. It is only when they export such articles to one belligerent that the right of capture is acquired by the other. Transport within the neutral territory is not forbidden; but it is an offence to send contraband of war across the frontier to a belligerent, whether by land or by sea. In other words the *commerce passif* of recent continental writers is allowed, but the *commerce actif* is left to the mercy of the belligerent who suffers from it. This is an old and well-established rule. Bynkershoek lays it down in the terse sentence, *Non recte vehamus, sine fraude tamen vendimus*.<sup>1</sup> Great Britain has always acted upon it. The United States adopted it at the commencement of their national existence. It is the universal doctrine of the Prize Courts of all civilized peoples, and has never been controverted, except by those theorists who would lay upon the

The essentials of guilt in the matter of contraband trade.

<sup>1</sup> *Quæstiones Juris Publici*, Lib. I., Ch. 22.

neutral state the unendurable burden of preventing all traffic in munitions of war between its subjects and the belligerent powers. We may state it broadly and without fear; but in doing so we must not omit one small qualification. A merchant vessel is free to carry such arms and munitions as may be deemed necessary for its own defence against pirates and enemies.

Secondly, it is clear that a belligerent destination is essential. This was brought out in the case of the *Imina*,<sup>1</sup> a neutral vessel captured in 1798 by a British cruiser. At the moment of seizure she was carrying a cargo of ship timber from Dantzic. Her original destination had been Amsterdam; but on learning that it was blockaded her master had altered his course and made for the neutral port of Embden. Lord Stowell released the vessel on the ground that "goods going to a neutral port cannot come under the description of contraband, all goods going there being equally lawful." But these words must not be taken apart from their context and the circumstances which caused them to be spoken. Embden was simply a place of neutral trade, and goods bound for it were about to enter a neutral market. But had it contained a belligerent fleet, articles *ancipitis usus* destined for the fleet, and not for the wharves and warehouses of the neutral city, would undoubtedly have been condemned as contraband. The case of the *Commercen*<sup>2</sup> is decisive on this point. The vessel was Swedish, and Sweden was neutral in the war of 1812-1814 between Great Britain and the United States. The *Commercen* was engaged in a voyage from Cork to the neutral Spanish port of Bilboa. But she carried a cargo of grain, and it was shown that her captain meant to deliver it to the British fleet then lying in Spanish waters. The vessel was captured before she reached her destination by an American privateer; and

<sup>1</sup> Robinson, *Admiralty Reports*, III., 167-170.

<sup>2</sup> Wheaton, *Reports of the Supreme Court*, I., 382; Pitt Cobbett, *Leading Cases in International Law*, p. 225.

the case finally came on appeal before the Supreme Court, which condemned the cargo on the ground that it was destined for the use of hostile forces. The principle would hold good were the *terminus* of the voyage wholly unconnected with ports of any kind. To supply the fleets or single cruisers of a belligerent with munitions of war on the open sea would be as clear a case of contraband trade as carrying a consignment of rifles to one of his garrison towns. It is the hostile destination which is essential; and the fact that such destination is nearly always a port must not cause us to ignore the few cases where it is nothing of the kind. Nor must we forget that the neutral shipmaster is not allowed to escape condemnation by ingeniously interposing a neutral destination between the commencement of his voyage and its real termination in hostile territory, or the place where a hostile fleet or army is lying. In such a case the doctrine of continuous voyages<sup>1</sup> applies, and the goods will be confiscated on account of the ulterior belligerent destination of the vessel. Moreover, the converse of this rule holds good. In cases where the destination of the vessel is undoubtedly neutral, the destination of the cargo is accounted neutral as well, unless perhaps the very strongest proof to the contrary is forthcoming. The intent of the owner is not the ruling factor in determining the liability of the goods to capture and condemnation, though Bluntschli and other writers lay great stress upon it.<sup>2</sup> The mental condition of the trader is likely to vary with the chances of the market and the dangers of the voyage. What it may be at the time of seizure is immaterial, if the goods are about to be delivered into the enemy's hands, and are of a kind to give direct and serious aid to his warlike operations.

Thirdly and lastly, we must bear in mind that the offence is completed when a neutral vessel leaves port with a belligerent destination and a contraband cargo, and is "deposited"

<sup>1</sup> See § 276.

<sup>2</sup> Bluntschli, *Droit International Codifié*, § 802; Kleen, *Contrebande de Guerre*, pp. 37-43; Wheaton, *International Law* (Dana's ed.), note 226.

when the destination is reached and the cargo delivered. As Lord Stowell said, in the case of the *Imina*, "The articles must be taken *in delicto*, in the actual prosecution of the voyage to an enemy's port. Under the present understanding of the law of nations you cannot generally take the proceeds on the return voyage."<sup>1</sup> This is the general rule; but it is capable of modification to meet the needs of justice. The principle which underlies it is that the penalty should attach as long as the offence exists. The offence generally exists from the beginning to the end of the outward voyage, and ceases to exist the moment the contraband goods are placed in the hands of the enemy. But if during the voyage the guilty destination has been changed for an innocent one, as happened in the case of the *Imina* cited above, or if a hostile destination becomes friendly through surrender or cession, then a capture made after the change has been effected will not result in condemnation. Similarly, if the outward and the homeward voyages are but parts of one transaction, conducted by the same persons and planned from the beginning as one adventure, and if on the outward voyage contraband goods and fraudulent papers are carried, the return voyage will not be regarded as a separate and innocent expedition. It is, however, somewhat doubtful whether this view would be acted upon at the present time. It was laid down by Lord Stowell, in the case of the *Nancy*;<sup>2</sup> but continental publicists condemn it as an undue extension of belligerent rights,<sup>3</sup> and the British Admiralty Manual contents itself with the statement that a commander should detain a vessel he meets on her return voyage with such a record as we have described behind her.<sup>4</sup>

<sup>1</sup> Robinson, *Admiralty Reports*, III., 168.

<sup>2</sup> *Ibid.*, III., 127.

<sup>3</sup> Cf. Ortolan, *Diplomatie de la Mer*, Liv. III., Ch. vi.

<sup>4</sup> Holland, *Manual of Naval Prize Law*, pp. 23, 24.

## § 280.

The usual penalty for carrying contraband is the confiscation of the contraband goods. The few treaties which provide for temporary detention only are exceptional,<sup>1</sup> and the mildness of their provisions has not been generally copied. In the Middle Ages the vessel also was forfeited, on the ground that the trade was illegal and therefore the ship-owners who engaged in it ought to suffer. The change to the milder practice of modern times began with the great growth of international trade in the seventeenth century, and, though a few of the rules at present applied by Prize Courts seem to be survivals of the old severity, the interests of commerce have on the whole made themselves felt as powerfully as in other departments of the law of maritime capture.

The penalty for carrying contraband.

The taint of contraband is held to attach in the first instance to the goods. It extends, however, to the vehicle that carries them when the vessel and the forbidden cargo belong to the same owner. In that case the ship also is condemned; and if the owner of the contraband articles is part owner of the ship, his share in her is confiscated. This rule proceeds upon the principle that "when a man is concerned in an illegal transaction, the whole of his property embarked in that transaction is liable to confiscation;"<sup>2</sup> and leads to the curious result that a neutral may carry the contraband goods of another neutral without any further penalty than the loss of freight, but may not carry his own contraband goods except at the risk of the loss of his vessel. It applies to innocent goods when their owner owns the contraband portion of the cargo. The French in 1778 endeavored to extend it under the name of infection or contagion

<sup>1</sup> e.g. The treaty of 1785 between the United States and Prussia. See *Treaties of the United States*, p. 903.

<sup>2</sup> Lord Stowell in the case of the *Yonge Tobias*, Robinson, *Admiralty Reports*, I., 330.

of contraband. They held that if three-quarters of the cargo, computed in value and not in bulk, were contraband, the remaining quarter, and the vessel as well, became infected by the proximity of the forbidden articles and were liable to condemnation without regard to the circumstances of ownership. But this ingenious doctrine has been condemned even by French writers, and cannot be regarded as part of International Law.<sup>1</sup>

It is, however, generally held that any resort to fraudulent devices for the purpose of defeating the right of search or deceiving the searching officer subjects the vessel to confiscation as well as the contraband cargo. The use of false papers, misrepresentation as to the destination of the ship, concealment of the noxious goods and similar practices are frequently resorted to; but unless they succeed in hoodwinking the belligerent against whom they are directed, their effect is but to increase the severity of the penalty. The same result follows when a neutral sends to a belligerent destination goods which are declared to be contraband by a treaty between his country and the country of the other belligerent. The breach of an international agreement is accounted an aggravation of the offence, and is held to justify the confiscation of the vessel in the event of capture. Some writers<sup>2</sup> go so far as to declare that mere knowledge on the part of the owner of the vessel of the employment of his ship in carrying contraband is sufficient to involve her in the condemnation meted out to the noxious goods. But when we consider that so long ago as 1798 Lord Stowell was able to say in the case of the *Ringende Jacob*,<sup>3</sup> "the carrying of contraband articles is attended only with the loss of freight and expenses, except when the ship belongs to the owner of the contraband cargo, or when the simple

<sup>1</sup> Glass, *Marine International Law*, pp. 136, 137.

<sup>2</sup> e.g. Bynkershoek, *Quæstiones Juris Publici*, Lib. I., Ch. 12; Halleck, *International Law*, Ch. XXVI., § 5.

<sup>3</sup> Robinson, *Admiralty Reports*, I., 91.



misconduct of carrying a contraband cargo has been connected with other malignant and aggravating circumstances," we may feel sure that a severity left unmentioned by him would not be tolerated in the milder practice of our own times.

### § 281.

Before we leave the subject of contraband of war it is necessary to consider two anomalous practices which are contrary to sound principles, but have the support of a greater or less amount of usage. The Two anomalous practices. first is fully explained by a stipulation of the treaty of 1800 between the United States and France, according to which a cruiser might take contraband goods out of a vessel engaged in carrying them, provided that the captain of such vessel was willing to surrender the articles in question, and they were not greater in quantity than the cruiser could conveniently receive.<sup>1</sup> In this way it was hoped the inconveniences of capture would be reduced to a minimum. The captor would have the contraband goods in his possession and be able to take them in for adjudication by a Prize Court, while the ship would be free to pursue her voyage without the expense and delay of a compulsory visit to the belligerent tribunal selected to decide the fate of her obnoxious cargo. These considerations have so far prevailed that similar stipulations have been embodied in a few later treaties, notably a group negotiated about the middle of the present century between the United States and several South and Central American republics. But they have not become general, and the practice they embody has never been resorted to in the absence of treaty engagements, though it is permitted by the maritime code of the *Institut de Droit International*.<sup>2</sup> It is open to the grave

<sup>1</sup> *Treaties of the United States*, p. 327.

<sup>2</sup> *Tableau Général*, p. 202.

objection of sending the case in one direction and the proof in the other. If the title to the goods taken as contraband is seriously disputed in the Prize Court, the captor has no evidence to clear up difficult points. The ship's papers are with the ship, which may be at the other end of the world, and the captain and supercargo are probably no nearer the spot where their testimony is required. The plan, plausible as it seems, strikes at the root of the one practice which has redeemed capture at sea from indiscriminate violence. In making a reasoned judicial decision difficult, if not impossible, it tends to degrade maritime law to the level of a haphazard system, and deprives it of its best security for impartial justice.

The other usage to which we refer as anomalous is well known under the name of pre-emption. It takes place when a belligerent seizes cargoes bound to a hostile destination and forcibly purchases them, on the plea that they are likely to be so useful to his enemy that they must be kept at all risks from reaching their appointed goal. In the Middle Ages governments claimed a right of first purchase of all goods brought into their ports by foreigners. Indeed they sometimes took the goods and forgot the obligation to pay for them.<sup>1</sup> The modern practice is confined to times of war and applies only to certain classes of neutral goods on their way to an enemy's port. The leading maritime nations have resorted to it; but their mode of computing the payment to be made has varied considerably. The best rule is that of the British Courts of Admiralty, which have been accustomed to give "the original price actually paid by the exporter,"<sup>2</sup> plus his expenses and a reasonable profit, which last was generally calculated at ten per cent on the first cost. Many modern writers have challenged the legality of pre-emption and referred to it as a usurpation rather than a

<sup>1</sup> Manning, *Law of Nations* (Amos's ed.), Bk. V., Ch. viii.

<sup>2</sup> Judgment of Lord Stowell in the case of the *Haabet*, Robinson, *Admiralty Reports*, II., 183.

right.<sup>1</sup> It is advisable, therefore, to examine the matter with some care; and, if we do so, we shall see at once that the cases which occur may be divided into three classes.

In the first place a belligerent may choose to purchase instead of confiscate goods that are undoubtedly contraband. Thus Great Britain, at the end of the last century, held that pitch and tar were lawfully confiscable when bound to an enemy's port. But if they were the produce of the owner's country, she paid for them instead of taking them as prize of war; "no unfair compromise, as it would seem, between the belligerent's rights, founded on the necessities of self-defence, and the claims of the neutral to export his native commodities, though immediately subservient to the purposes of hostility."<sup>2</sup> Her present claim is based on the same principle. It is to be found in the Admiralty Manual of 1888, and runs as follows: "The carriage of goods conditionally contraband, and of such absolutely contraband goods as are in an unmanufactured state and are the produce of the country exporting them, is usually followed only by the pre-emption of such goods by the British Government, which then pays freight to the vessel carrying the goods."<sup>3</sup> That is to say, an indulgence is granted to the neutral owner. His goods are forfeit. They could be taken without payment; but instead the belligerent pays for them. Provided that the legal assumption on which this practice is based be correct, there can be no manner of objection to it. If the captured goods are really contraband, he would indeed be a foolish owner who made a grievance of being obliged to receive hard cash for what might have been snatched from him without compensation of any kind.

Secondly, pre-emption may be agreed upon between a neutral and a belligerent government when the latter claims the

<sup>1</sup> e.g. Ortolan, *Diplomatie de la Mer*, Liv. III., Ch. vi.

<sup>2</sup> Judgment of Lord Stowell in the case of the *Sarah Christina*, Robinson, *Admiralty Reports*, I., 241.

<sup>3</sup> Holland, *Manual of Naval Prize Law*, p. 24.

right to capture goods which the former maintains ought not to be regarded as contraband of war. This was the plan adopted in the treaty of 1794 between Great Britain and the United States, in order to avoid "the difficulty of agreeing on the precise cases in which alone provisions and other articles not generally contraband may be regarded as such."<sup>1</sup> There can be no doubt about the legality of forcible purchase under such circumstances. If the powers concerned choose to make an agreement to permit it, they are within their rights, and other states have no ground for objecting to an arrangement which does not concern them.

But a third application of the practice is possible; and when it takes place a serious trespass upon the rights of neutrals is committed. Goods not liable to confiscation as contraband may be subjected to pre-emption. This was done in 1793 by Great Britain and France.<sup>2</sup> The act of these two powerful belligerents gave rise to a long and bitter controversy, in which neutral nations, especially Denmark and the United States, maintained that provisions could not be regarded as contraband unless they were destined for a besieged place or a hostile fleet or army. They held that any attempt on the part of a belligerent to prevent neutral trade in such commodities with the open commercial ports of his enemy was an act of illegal violence for which reparation was due. When in 1795 Great Britain issued an Order in Council instructing her cruisers to bring in for pre-emption cargoes of provisions bound for any port in France, she defended her action on the ground that, as the entire population of France was in danger of famine and her own people were threatened with scarcity, she had a right to treat what would relieve their necessities, not indeed as contraband, but as bordering on the nature of contraband, and therefore subject to pre-emption, though not to confiscation. These arguments did

<sup>1</sup> *Treaties of the United States*, p. 389.

<sup>2</sup> Manning, *International Law* (Amos's ed.), p. 386; C. de Martens, *Causes Célèbres*, II., Cause Dixième.

not satisfy the joint commission appointed under the seventh article of the treaty of 1794 between Great Britain and the United States to adjudicate upon the claims of American citizens who complained of losses by illegal capture. Compensation was granted to the owners of the vessels and cargoes seized under the obnoxious Orders in Council.<sup>1</sup> These events may be held to have established the position that there can be no middle term between contraband and non-contraband. Goods carried by neutrals to unblockaded belligerent ports are either contraband, in which case they may be confiscated, or non-contraband, in which case they may not be molested. Apart from special treaty stipulations pre-emption to be legal must be an indulgence granted to neutral traders by a belligerent who does not insist upon his full right of seizure and condemnation.

<sup>1</sup> Wheaton, *International Law*, §§ 490-501; *Treaties of the United States*, pp. 384, 385.

## CHAPTER VII.

### UNNEUTRAL SERVICE.

#### § 282.

THERE are certain acts which neutral merchantmen cannot perform for one belligerent without making themselves amenable to capture and condemnation by the other. These acts are generally discussed in connection with the carriage of contraband; but of late years a few publicists have begun to see that there is a wide difference between the two misdeeds. Yet the idea that they must be classed together is still strong. Hall speaks of them as Analogues of Contraband,<sup>1</sup> and the Maritime Code of the *Institut de Droit International* deals with them along with contraband trade under the title of *Des transports Interdits durant la Guerre*.<sup>2</sup> Dana<sup>3</sup> and Kleen<sup>4</sup> see their real character, and point out that it is special and peculiar. In truth between the carrying of contraband and the performance of what we may term *Unneutral Service* there is a great gulf fixed. The nature of the latter will appear as we examine the acts which are included under it; and when we have dealt with them in detail we shall be in a position to show how they differ from the offence with which they are usually confounded.

<sup>1</sup> *International Law*, Pt. IV., Ch. vii.

<sup>2</sup> *Tableau Général*, pp. 201, 202.

<sup>3</sup> Note 228 to Wheaton's *International Law*.

<sup>4</sup> *Contrebande de Guerre*, pp. 223-232.

A neutral ship is forbidden to

1. Transmit certain kinds of signals or messages for a belligerent.
2. Carry certain kinds of despatches for a belligerent.
3. Transport certain kinds of persons in the service of a belligerent.

The penalty attached to the performance of these acts is confiscation of the vessel concerned in them, and confiscation of the cargo also in cases where its owners "are directly involved in the knowledge and conduct of the guilty transaction."<sup>1</sup> And this penalty is inflicted without regard to the neutral or belligerent character of the port to which the ship is bound.

We will take the acts of unneutral service in the order we have enumerated, and deal first with the transmission of signals or messages for a belligerent. If a neutral vessel becomes a vehicle for carrying between two portions of a belligerent fleet messages bearing on the conduct of the war, or signals such messages from one to the other, she is performing an act so contrary to the nature of neutrality, that the other belligerent may consider her as engaged in the service of his enemy and treat her accordingly while she remains so employed. The same may be said of signalling or bearing messages between a fleet and a land force, or laying a cable to be used mainly or exclusively for warlike purposes. Assistance of this kind goes far beyond the ordinary offices of friendship and humanity. It amounts to a participation in the war and is regarded as such by the combatant who suffers from it.

We have next to consider the carrying of certain kinds of despatches for a belligerent. All communications are not forbidden, but only those which may be deemed official,

<sup>1</sup> Judgment of Lord Stowell in the case of the *Atalanta*; see Robinson, *Admiralty Reports*, VI., 460.

and even from these diplomatic despatches are excepted, when the neutral carries them between a belligerent government and its minister in a neutral country, or between a neutral government and its minister in a belligerent country. This exception and the reasons for it were admirably stated in the case of the *Caroline*,<sup>1</sup> an American vessel captured by a British cruiser in 1808, when on a voyage from New York to Bordeaux. She carried a cargo of cotton, but also diplomatic and consular despatches from the French minister at Washington and a French consul in America to the French Government at home. Lord Stowell in giving judgment laid down as a general rule that the carrying of despatches for the enemy by a neutral was illegal; and defined despatches as "official communications of official persons, on the public affairs of the government." But he went on to say that "the neutral country has a right to preserve its relations with the enemy, and you are not to conclude that any communication between them can partake, in any degree, of the nature of hostility against you." That being the case, there was no ground for saying that the neutral carrier had violated his duty by bearing despatches presumably of an innocent nature. The ship was, therefore, restored; and, in a subsequent case, in which consular despatches alone were concerned, a similar decision was rendered.<sup>2</sup> We may sum up the law of the matter, as given in unchallenged decisions of Prize Courts, by declaring that neutrals may not carry military or naval despatches for the belligerents, or despatches between a belligerent government and the officials of its colonies and dependencies, but they may carry diplomatic and consular despatches, and also private letters and communications relating to business affairs.

This brings us to the peculiar position of neutral mail-steamers and other vessels carrying mails by agreement

<sup>1</sup> Robinson, *Admiralty Reports*, VI., 464-470.

<sup>2</sup> The *Madison*; see Edwards, *Admiralty Reports*, p. 224.



with a neutral government. Their owners and captains cannot be held responsible for the nature of the numerous communications they carry. They would grossly violate the trust reposed in them if they took steps to become acquainted with the contents of the letters under their charge. Knowledge, therefore, cannot be imputed to them, should noxious despatches happen to be on board; and their vessels are not held liable to confiscation merely because of the presence of such despatches in the mail-bags, though the immunity would not extend to other forms of unneutral service. Thus far the common law of nations operates to protect the ordinary vehicles of international communication. But in recent times a usage has grown up of exempting packet-boats, not merely from condemnation, but also from visit, search and capture.<sup>1</sup> This further immunity has, however, been conceded by belligerents as a matter of grace and favor. There is little doubt that it will continue to exist; but it has not at present become a right which neutrals are entitled to claim. When the United States granted it in 1862, they added the proviso that "simulated mails verified by forged certificates and counterfeit seals" should not be protected thereby; and in 1870 France insisted upon the condition that an agent of the neutral state should be in charge of the mail-bags and declare them to be free from noxious communications. It is obvious that these precautions against the use of the mails for the conveyance of intelligence by the enemy are of little practical utility. The more valuable the information, the more innocent it would be made to appear. The word of a postal clerk of the neutral government might be given with the most perfect honesty, but could afford no real guarantee of the harmlessness of each unit among hundreds of thousands of communications, not one of which he had read. In granting immunity from search to mail-steamers belligerents must recognize that they are surren-

<sup>1</sup> Wheaton, *International Law* (Dana's ed.), p. 659, note.

dering an important safeguard against possible damage to themselves. It will probably be worth their while to make the concession rather than dislocate neutral commerce; but they cannot at one and the same time make it and retain the security derived from the stricter rule.

Our third and last head must now be dealt with. A neutral may not transport certain kinds of persons in the service of a belligerent. He is not forbidden to carry in his regular packet-boats individuals who pay for their berths in the usual way and come on board as ordinary passengers, even though they turn out to be officers of one or the other of the combatant powers. In the case of the *Friendship*, Lord Stowell declared that no British tribunal had ever gone the length of preventing a military officer in the service of the enemy from travelling in a neutral vessel if he went as an ordinary passenger, and at his own expense.<sup>1</sup> But naval or military persons coming on board as such, and travelling at the expense of a belligerent government, are carried by a neutral merchantman at the risk of seizure and confiscation. Even when it is the ordinary business of the vessel to carry passengers, a contract of hiring made with the agent of one of the warring powers would probably lead to her condemnation in the event of capture; and there can be no doubt about the fate of a mere cargo-boat so hired, and used for the conveyance of belligerent forces or officials. In most of the reported cases a special contract of the nature described had been entered into and was made one of the chief grounds of condemnation. The *Orozembo*, for instance, a neutral American vessel, was condemned by an English Prize Court because the owner or his agents had agreed with the government of Holland, a power at war with Great Britain, to let the vessel for the transportation of three military officers of distinction from Europe to Batavia.<sup>2</sup> The number of persons carried under such circumstances is immaterial. A whole regiment might be far less

<sup>1</sup> Robinson, *Admiralty Reports*, VI., 429.

<sup>2</sup> *Ibid.*, VI., 490-499.

valuable to a belligerent than one or two skilled commanders. If one side deems them important enough to be sent out at the public expense, the other side is justified in decreeing the forfeiture of the vessel which carries them. The transportation of civil officials would probably entail the same consequences as the transportation of fighting men. But just as diplomatic despatches are privileged, so also are diplomatic persons. Neutral vessels may freely carry representatives of the belligerent governments to and from their posts in neutral countries.

The most important and the most frequently performed unneutral services are arranged under the three heads we have just enumerated. But the classification is by no means exhaustive. There are other ways of giving unlawful aid to belligerents besides those we have been considering. The exigencies of warfare are so numerous and so changeful that no one can describe beforehand every possible mode in which a neutral ship may make herself into a transport in the service of one or other of the belligerents. The principle of the law is clear. It forbids anything approaching to an actual participation in the war. The application of the principle must be settled in each case as it arises. Among the acts which it assuredly covers we may mention transferring provisions, coals or ammunition from one belligerent ship to another at sea, and showing the channel to a fleet advancing for a hostile attack.

### § 283.

We have already seen that the ordinary penalty for unneutral service is the confiscation of the peccant ship and any part of the cargo which belongs to her owner. Her liability to capture and condemnation commences when she commences the unlawful services, and continues either till the termination of her voyage, or till she has delivered the forbidden despatches, deposited the forbidden persons, or

The penalty for unneutral services and the essentials of liability to it.

finished the performance of the forbidden acts. But in some cases the offence is of such a character that it is possible to commit it inadvertently. This is true in a special manner of carrying despatches, which may easily be disguised as private communications and palmed off upon unsuspecting skippers. The law demands a reasonable amount of caution from the neutral shipmaster. He is bound, for instance, to be more careful in a belligerent than in a neutral port; and if the communication he is asked to convey is sent by or addressed to a known agent of a warring government, he must require stronger assurances of its innocuous character than if it purported to be passing between private persons. But when, in spite of due precautions, he is deceived, his ship will escape confiscation. This was decided by the case of the *Rapid*,<sup>1</sup> which was an American vessel plying between two neutral ports, but found to have on board letters containing important information for the belligerent government of Holland. The British Prize Court, however, released her on the ground that the communications appeared on the outside to be private and were given by a private person in a neutral port to be carried to another private person in another neutral port. But in the case of the *Susan*<sup>2</sup> ignorance of the nature of the despatches, unaccompanied by caution, was not held sufficient to cause the release of the vessel. To ensure condemnation fraud on the part of the captain is not necessary. It is enough if he knows the character of the documents he carries, or even if he has neglected to exercise due care in order to assure himself that they are not forbidden communications. Fraud and fraudulent concealment will, however, be visited with the severest penalty possible, whereas blundering but honest incapacity is unlikely to lead to anything more than the loss of the ship.

It is clear that the knowledge of the shipmaster is an

<sup>1</sup> Edwards, *Admiralty Reports*, p. 228.

<sup>2</sup> Robinson, *Admiralty Reports*, VI., 461, note.

important factor in the determination of a large class of cases. But even more important is the character of the contract made with regard to the vessel and the service it is expected to perform. Whenever it can be shown that the neutral owner or shipmaster has entered into a special agreement with a belligerent government or its agent to let out his vessel for the purpose of doing any of the acts described in the preceding section, the vessel becomes *ipso facto* a transport in the service of that belligerent and is subject to condemnation if captured by the cruisers of the other side. This kind of contract seldom exists with regard to the conveyance of despatches, which are so small in bulk, so easy of transmission, and so readily disguised as innocent communications, that neutral captains may often be induced to take them without any agreement to put their vessels at the disposal of a warring power. But the contract in question is frequently found when naval or military men, or official personages, are carried, and when it exists the number of such individuals is immaterial. Indeed it might be argued that, even if none were on board at the moment of capture, the vessel was lawful prize, provided that the contract still held good and she was on her way to perform any part of it.

A careful examination of the recorded cases shows that we may resolve the vessels performing unneutral service into two classes. In the first class we may place all neutral ships actually engaged as transports in the service of a belligerent. Such transports were defined by Lord Stowell in the case of the *Friendship* as "vessels hired by the government to do such acts as shall be imposed upon them, in the military service of the country."<sup>1</sup> But in the case of the *Carolina*<sup>2</sup> he took a wider view, and decided that a neutral Swedish ship which had been forced to act as a French transport was not exempt from condemnation by reason of the duress that had been applied to her. It did

<sup>1</sup> Robinson, *Admiralty Reports*, VI., 425.

<sup>2</sup> *Ibid.*, IV., 260.

not appear that the master had made any remonstrance against the service on which he was employed, or refused to victual and navigate his ship. Undoubtedly his proper course would have been to surrender his vessel under protest to the French authorities as a prize, leaving it to his own government to demand reparation for her unlawful detention. Yet it may be questioned whether the doctrine that the neutral captain cannot be permitted to plead force as an excuse would hold good to-day. The distinction which Lord Stowell refused to draw between voluntary and involuntary action would probably be drawn in a modern Prize Court. But the rule that confiscation must follow capture, when there is an actual entry into the enemy's service under the provisions of a contract made between him and the neutral, remains unchallenged, and would certainly be applied in any future maritime struggle.

The second class of vessels engaged in the performance of unneutral acts consists of those which have not entered as transports into the service of a belligerent, but are nevertheless seized while giving him forbidden assistance. Contract is absent in these cases. No special agreement to place the ship at the disposal of a warring power has been made by the neutral owner or captain. But the absence of anything of the kind will not save the vessel from condemnation in the event of capture, if those who have control of her knowingly do any of the prohibited acts. Their knowledge is the important point. Prize Courts assume that they possess it, and put upon them the burden of proof of ignorance. They must, however, do more than show that they were not aware of the true character of the persons or papers entrusted to their care. It is necessary for them to prove that they took all reasonable precautions to avoid error. Ignorance pure and simple will not avail to prevent forfeiture. Excusable ignorance is the only ground for leniency.<sup>1</sup>

<sup>1</sup> For an excellent summary of the cases see Dana's note on *Carrying Hostile Persons or Papers*, in his ed. of *Wheaton's International Law*, pp. 637-644.

## § 284.

We are now in a position to distinguish clearly between the offence of carrying contraband and the offence of engaging in unneutral service. They are unlike in nature, unlike in proof and unlike in penalty. To carry contraband is to engage in an ordinary trading transaction which is directed towards a belligerent community simply because a better market is likely to be found there than elsewhere. To perform unneutral service is to interfere in the struggle by doing in aid of a belligerent acts which are in themselves not mercantile, but warlike. In order that a cargo of contraband may be condemned as good prize, the captors must show that it was on the way to a belligerent destination. If without subterfuge it is bound to a neutral port, the voyage is innocent, whatever may be the nature of the goods. In the case of unneutral service the destination of the captured vessel is immaterial. The nature of her mission is the all-important point. She may be seized and confiscated when sailing between two neutral ports. The penalty for carrying contraband is the forfeiture of the forbidden goods, the ship being retained as prize of war only under special circumstances. The penalty for unneutral service is first and foremost the confiscation of the vessel, the goods on board being condemned when the owner is involved or when fraud and concealment have been resorted to.

The distinction between the offences of carrying contraband and engaging in unneutral service.

Nothing but confusion can arise from attempting to treat together offences so widely divergent as the two now under consideration. This was shown in a marked degree by a famous case, which occurred towards the end of 1861. On November 8 in that year the American cruiser *San Jacinto* stopped the British mail-steamer *Trent* when on her usual voyage between the two neutral ports of Havana and Nassau, and took from her Messrs. Slidell and Mason,

who were proceeding to Europe as agents of the Confederate Government in France and England respectively. The vessel was then allowed to continue her voyage, and the Southern commissioners and their two secretaries were landed, and detained as prisoners at Boston. The news of the seizure reached London on the 27th of November. On the 30th, the British Government demanded the release of the captured individuals. Troops and stores were despatched to Canada; and the warlike feeling evoked in England found its counterpart on the other side of the Atlantic, where Captain Wilkes, the commander of the *San Jacinto*, was publicly feasted, and Congress, on December 4, honored him with a vote of thanks. Fortunately, a few wise and peace-loving men were not carried away by the general excitement. Foremost among them were the late Prince Consort in England and the late President Lincoln in America. Owing mainly to their calm judgment and self-sacrificing efforts, the terrible calamity of war between two kindred nations was avoided. On December 26, Mr. Seward, the American Secretary of State, argued the question at great length in a comprehensive despatch, and concluded by agreeing to give up the prisoners on the ground that they ought not to have been taken out of the vessel, but should have been brought in, with the vehicle which carried them, for adjudication by a properly constituted Prize Court. A few days later they were placed on board an English man-of-war, to be taken to Nassau, the port for which the *Trent* was making when the seizure took place. This settled the matter immediately in dispute, and put an end to the acute stage of the controversy. But on January 23, 1862, Earl Russell, who was then Secretary of State for Foreign Affairs in the British Government, replied in an elaborate state paper to the arguments of the American despatch of the previous month. This he did in order that Her Majesty's government might put on record its disagreement with



some of Mr. Seward's conclusions. The discussion went no further as between the official representatives of the two powers concerned; but private persons carried it on with great vigor for many months; and even now the case of the *Trent* forms a subject for discussion in books on International Law. To us its value as a leading case ranks very low. It was argued throughout on an erroneous assumption. Mr. Seward labored earnestly to prove that the Confederate commissioners and their suite were contraband of war. Earl Russell strove with equal toil to show that they were nothing of the kind. Mr. Seward regarded the neutral destination of the *Trent* as a fact of no moment. Earl Russell held it to be decisive in favor of her immunity from belligerent capture. Both sides persisted in attempting to apply to the facts before them the principles of the law of contraband, whereas the question to be resolved was clearly concerned with unneutral service. The law of contraband provides for dealing with things, not persons, as Mr. Seward plainly saw. But nevertheless he did not seem to suspect that there was any other way of bringing the points at issue to the decision of a properly constituted tribunal. Excuse for this failure to discern what is abundantly evident may be found in the language of a few treaties and a considerable number of writers, who place in their lists of contraband such persons as soldiers and sailors. But those who have followed the arguments of the two preceding sections will hardly need to be told that the carriage of belligerent individuals by neutral vessels and the carriage of articles of contraband trade stand on very different grounds and are judged by very different rules. The complexity and difficulty of the case of the *Trent* would have vanished in a moment had the principles appropriate to it been recognized and applied. Neutral vessels may innocently carry some kinds of persons belonging to communities at war. Other kinds they may not carry except at the risk of capture and confiscation by the belligerent who suffers from

their service to his foe. The *Trent* was undoubtedly engaged in transporting four citizens of the Southern Confederacy. The only question to be argued was whether they belonged to the allowed or the forbidden class. The destination of the vessel was absolutely immaterial. The provisions of the law of contraband were beside the mark. What required to be applied was the law of unneutral service. Those of its rules which bear upon the matter in dispute are very simple. A neutral vessel, not being in the service of a belligerent as a transport, may lawfully carry both his diplomatic agents and his private citizens. Now the exact *status* of Messrs. Slidell and Mason may well be regarded as doubtful. The Confederacy, of which they were agents, had been recognized as a belligerent power, but not as a sovereign state. It could not, therefore, accredit formal and official diplomatic ministers to foreign countries, and was reduced to sending informal envoys. But if these gentlemen were not diplomatists, they were private persons, and in neither capacity was the neutral precluded from transporting them as ordinary passengers in his mail packets. Consequently the seizure was illegal, and would have been illegal had Captain Wilkes brought in the vessel and all she contained for adjudication by a lawful Prize Court. A contrary decision would, as was pointed out at the time, have authorized the seizure of the Dover packet-boat by a Federal or a Confederate cruiser, had an important diplomatic agent of the other side been crossing in her from England to France or from France to England. Such a drastic interference with neutral trade was never contemplated by International Law.<sup>1</sup>

<sup>1</sup> The literature of the *Trent* Case is voluminous. The facts and arguments will be found in Wharton, *International Law of the United States*, §§ 328, 374; Montague Bernard, *Neutrality of Great Britain in the American Civil War*, Ch. IX.; Dana, note on *Carrying Hostile Persons or Papers*, in his ed. of Wheaton's *International Law*, pp. 644-659; and *Letters of Historicus*, IX.

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